KLUANG WOOD PRODUCTS SDN BHD & ANOR *a*

v.

HONG LEONG FINANCE BHD & ANOR

SUPREME COURT, KUALA LUMPUR *b*
LAMIN MOHD YUNUS PCA
CHONG SIEW FAI CJ (SABAH & SARAWAK)
MOHAMED DZAIDDIN FCJ
[CIVIL APPEAL NO: 02-287-94]
24 OCTOBER 1998 *c*

TORT: *Misrepresentation - Negligent misrepresentation - Bank manager's pre-contractual statement to the effect that loan will be approved - Subsequent letter approving loan - Loan not made available - Whether statement amounts to negligent misrepresentation - Whether subsequent letter substantiated bank manager's statement - What must be shown to claim negligent misrepresentation successfully - Whether bank manager has duty of care in making such statements - Whether failure to disburse loan amounts to fundamental breach going to root of contract* *d*

TORT: *Misrepresentation - Negligent misrepresentation - Whether an impression formed from statement can amount to representation - Who ought to test propriety of impression* *e*

CONTRACT: *Construction - Loan - Approval of loan "subject to terms and conditions" - Whether approval subject to conditions or whether loan approved with conditions - Syndication of end-finance facility - Whether this necessarily means loan approval must be subject to participation of other financial institutions - Whether there is a legal obligation to secure the syndication of end-finance facility* *f*

CONTRACT: *Breach - Oral representation - Whether representation amounted to collateral warranty - What amounts to a collateral warranty - Whether representation was promissory in nature - Effect of breach of collateral warranty* *g*

CIVIL PROCEDURE: *Res judicata - Cause of action estoppel - Earlier suit between first defendant and second plaintiff - First plaintiff not party to earlier suit - Second plaintiff a director of first plaintiff - Whether similar issues involved in present proceedings and earlier suit - Whether there is identity of subject matter - Whether issues in present proceedings could have been raised in earlier suit - Who bears burden of proving cause of action estoppel* *h*

i

CIVIL PROCEDURE: *Res judicata - Parties - Privity of interest - Earlier suit between first defendant and second plaintiff - First plaintiff not party to earlier suit - Second plaintiff a director of first plaintiff - Whether first plaintiff a privy to second plaintiff*

TORT: *Negligence - Proof of negligence - What are the necessary elements*

CONTRACT: *Parol evidence - Contract reduced to writing - Oral statements made prior to contracting - Effect of statement not in contract nor inconsistent with it - Whether admissible - When such statements admissible*

CONTRACT: *Agency - Principal and agent - Whether agent can sue on contract*

The first appellant was a licensed housing developer while the second appellant was a director of the first appellant. For purposes of developing a housing estate on a piece of land that they owned ('the land'), the first appellant successfully negotiated with the first respondent ('Hong Leong') for a bridging loan and end-financing facilities. According to the second appellant, during negotiations with the southern regional manager of Hong Leong ('the manager'), the latter represented to him that Hong Leong would furnish the first appellant with a bridging loan and a syndicated end-financing facility to be managed by Hong Leong. Apparently, the manager said that for a finance company of Hong Leong's repute, the amount requested was "peanuts". Shortly after, Hong Leong issued a letter of offer which was accepted by the first appellant. The material part of the letter stated, "We … are pleased to confirm that our Management Committee has approved your Bridging Loan of M$3.5 million and End-Finance of M$26 million subject to the following terms and conditions."

The bridging loan was secured by a first legal charge on the land and a letter of guarantee executed by all directors of the first appellant, including the second appellant. In respect of the end-finance facility, Hong Leong was to be the manager for the syndication of the facilities whilst committing RM5 million of its own towards the same. As security for the RM5 million provided by Hong Leong, the second appellant executed another letter of guarantee. It was in evidence that Hong Leong sent proposals to other financial institutions requesting them to participate in the syndication of the end-finance. Unfortunately however, no successful response emerged and thus the entire syndication for the end-finance did not materialise.

Although the bridging loan was fully disbursed to the first appellant, the end-finance facility, including the RM5 million committed by Hong Leong, was never made available. Based on the aforesaid representation of the manager

and the letter of offer issued by Hong Leong, the appellants instituted a claim for damages contending negligent misrepresentation and/or breach of collateral warranty. It was asserted that Hong Leong was under a duty to take reasonable care in the making of the said representation but instead, the representation was made negligently and therefore Hong Leong had acted in breach of their duty. As regards their alternative contention of breach of a collateral warranty, it was averred that the said representation constituted a collateral warranty by Hong Leong to the effect that it would provide end-finance facilities to the first appellant. By reason of their failure to so provide, it was submitted that Hong Leong had acted in breach of the terms of the said collateral warranty.

The respondents, meanwhile, submitted that the letter of offer and its subsequent acceptance did not place Hong Leong under an obligation to secure the syndication of the end-finance. Instead, they argued that Hong Leong as lead manager was merely obliged to try and secure the end-finance facility by getting other financial institutions to participate in the syndication. Moreover, they contended that the syndication of the loan was conditional upon the first appellant's compliance with certain terms and conditions and since the first appellant failed to do so, it was submitted that Hong Leong's obligation to provide the end-finance facility did not arise. As opposed to this, the appellants contended that Hong Leong's letter of offer and the first appellant's acceptance thereof constituted, *inter alia*, a distinct contractual obligation on the part of Hong Leong to provide a syndicated end-finance. To support this contention, the appellants submitted that they had even executed a guarantee as security for the end-finance facility.

Apart from the above, the respondents resisted the appellants' claim on the ground that the said representation rested on the impression derived by the second appellant rather than on actual utterances by the manager. Further, the respondents also questioned the admissibility of the said oral representations in the light of s. 92 of the Evidence Act 1950 which generally prohibits the admission of oral statements where a contract has been reduced to writing.

The final point of contention in this appeal was on the issue of *res judicata.* Prior to the institution of this claim by the appellants, Hong Leong, upon the failure of the first appellant to repay the bridging loan, sought to enforce the guarantee issued to secure the said loan. A writ against the guarantors, including the second appellant, was issued. Upon hearing arguments from both sides, the High Court granted final judgment under O. 14 of the Rules of the High Court 1980 against the guarantors ('the other suit'). It was submitted that the first appellant was well aware of all the facts at material times since the second appellant was at all material times a director of the first appellant. Based on this, the respondents contended that there was privity of interest between the first and second appellant. Furthermore, the respondents claimed

that the issues raised by the appellants in their statement of claim in this action and the issues raised by the second appellant in his affidavit in reply in the other suit, relied on the non-release of the end-finance. In effect, the respondents alleged that the questions of negligent misrepresentation and breach of collateral warranty had already been litigated in the other suit and thus the appellants are estopped from raising the same issues in this action.

The appellants argued that they were not precluded from bringing the present claim as a separate action. Firstly, they claimed that no privity of interest existed as there was no common interest between the first and second appellant. The first appellant was not a party to and had no interest in the other suit and thus they could not possibly have raised the cause of action of negligent misrepresentation and breach of collateral warranty as a defence or counterclaim in the other suit. Secondly, it was submitted that the other suit was concerned with the recovery of the amount owed under the bridging loan whereas the present action was a tortious action of negligent misrepresentation with respect to the end-financing and therefore, there were two distinct actions.

The material parts of the affidavit in reply of the second appellant in the other suit showed that the issues raised by him were, firstly, that Hong Leong was estopped or it was inequitable for Hong Leong to claim the guaranteed sum by reason of its failure to release the end-financing and, secondly, that he was induced into signing the guarantee based on the letter of offer and the representation that the end-finance would be granted.

At the High Court, the trial judge found that the appellants succeeded on their principal claim of negligent misrepresentation with respect to the end-finance facility. It was further held that the representations made by the manager regarding the availability of the end-financing facility constituted a collateral warranty and that this was breached when no end-financing was made available. This notwithstanding, the trial judge dismissed the application because the doctrine of *res judicata* or issue estoppel in the broader sense applied.

The appellants appealed against the dismissal of the action whilst the respondents cross-appealed against the finding of the trial judge with regards the issues of negligent misrepresentation and collateral warranty.

Held:

Per Lamin Mohd Yunus PCA (majority)

[1] The material part of the letter of offer can only be read to mean that the two items, namely the bridging loan and end-finance, were approved.

[2] The first condition in the letter of offer states that the "total End-Financing facilities to be syndicated by HLFB" and this must be capable of conveying the meaning that Hong Leong undertook to organise and to make available the said facilities.

[3] The oral representation of the manager substantiated by the certainty of availability of the end-finance conveyed by the letter of offer together with the undisputed fact that no end-finance at all was made available must necessarily constitute a fundamental breach by Hong Leong that went to the root of the contract.

Per Chong Siew Fai CJ (Sabah & Sarawak) (majority)

[1] In so far as the conclusion of a trial judge is a finding of fact on the oral evidence set in the appearance, demeanours and credibility of the witnesses before him, the appellate court should normally defer to the opinion of the trial judge. Generally, such finding ought not be disturbed unless the appellate court is convinced that it is wrong. It would not be sufficient to warrant any interference merely because the appellate court entertains doubt whether such finding is right.

[2] It cannot be denied upon construction of the letter of offer that the bridging loan and the end-finance were approved with terms and conditions to be complied. However, the contention that the approval was subject to certain conditions or conditions precedent is not tenable.

[2a] The letter clearly stated that Hong Leong had "approved" the end-finance of M$26 million. There is nothing in the letter indicating the approval being subject to any condition precedent or to Hong Leong being able to get the syndicated loan or the like. In the circumstance, all such terms and conditions in the letter relating to the management of the end-finance by Hong Leong, total amount of the end-finance to be syndicated, and Hong Leong's participation therein, reinforce the stipulation that the end-finance would be furnished.

[3] The oral representation substantiated by the letter related to the certainty of availability of the end-finance. No end-finance at all was made available and the syndication fell through. Therefore, there had been a fundamental breach by Hong Leong that went to the root of the contract.

[4] An impression, if properly formed from negotiation with someone, can form the basis of a representation. If there is any doubt, it is for the opposing party to test the propriety or correctness of the alleged impression.

[4a] It is not an unfair or unreasonable conclusion that what was represented gave the impression of certainty of the availability of the end-finance.

[4b] The subsequent letter approving, *inter alia*, the end-finance materially substantiated the impression respecting the certainty of the financial arrangement.

[5] Proof of negligence involves proof of some duty owed by the defendant to the plaintiff, some breach of that duty and damage to the plaintiff which is causally connected with the breach of duty to take care.

[6] In relation to statements made in pre-contractual negotiations, if a contracting party is under a duty of care in making such statements, a breach of that duty may lead to liability in the tort of negligence.

[7] An action for damages lies in respect of a misstatement which was negligently made thereby causing pecuniary loss to a person relying on such statement unless responsibility is expressly disclaimed in making the statement.

[8] The manager had been negligent in making the statements upon which the first appellant acted by making the loan application to its detriment.

[9] Proviso (b) to s. 92 of the Evidence Act 1950 admits evidence of a separate oral agreement in certain instances. In considering whether the proviso applies, regard is to be had to the nature of the written agreement and also its surrounding circumstances.

[9a] The document in the instant case is in the form of a letter. The certainty of the end-finance and the manager's utterances giving rise to the impression of such certainty are not in the document, nor is the certainty of the finance inconsistent with the terms therein. Therefore, the proviso applies.

[10] With regards the collateral warranty, the pertinent question is whether the manager had represented to the second appellant to the effect that the availability of the end-finance was a certainty. As this question was answered affirmatively, the representation amounted to a collateral warranty. By not making the end-finance available, the collateral warranty was breached and this resulted in the failure of the housing project.

[11] The grounds or reasons for the decision in the other suit were not exhibited in this case. Hence it was not established that the two questions or causes of action in this action had been adjudicated upon, the burden of which lies on the party who alleges it.

[12] The affidavit in reply of the second appellant in the other suit shows that the issues of collateral warranty and breach thereof, and negligent misrepresentation by Hong Leong were not even raised in the other suit, let alone having been adjudicated upon.

[12a] There was no identity of subject matter and no cause of action estoppel in the present case. The issues in the other suit were whether there was estoppel and whether the signing was induced by the alleged misrepresentation, if any. The questions in the present case were whether at an earlier date there had been negligent misrepresentations and whether the representations constituted a collateral warranty and breach thereof. The timing and facts forming the background of the questions raised in the two suits are different. The questions in the present case relate to matters that took place prior to matters relating to the issues raised in the other suit.

[12b] Answers, whether affirmative or negative, to the issues in the other suit do not necessarily mean similar answers to the causes of action in the present case.

[12c] As for the first appellant, it obviously could not have raised the issues constituting the causes of action in the instant case in the other suit because it was not a party to the other suit.

[13] As to the issue of whether the first appellant was a privy to the second appellant so as to be estopped from suing in this action, the relevant privity is privity of interest.

[13a] Whether there is sufficient connection to constitute privity of interest would depend on an examination of the factual identity of interests of the parties and the fairness of binding them by a decision in which they were not represented.

[13b] For the reasons given above, including that the first appellant was not a party to the other suit, there is no valid ground for holding that the first appellant was in privity of interest with the second appellant in the other suit or that they were so linked as to make the doctrine of *res judicata* applicable.

[14] An agent who has contracted for a disclosed and named principal cannot, as a rule, sue on the contract. This is so even if he is the real principal unless the other party has affirmed the contract with knowledge of the fact.

[14a] The second appellant, to the knowledge of Hong Leong, negotiated for the first appellant throughout. The right of action to which the collateral warranty gives rise is personal as between the two contracting parties concerned. As between them, breach of the warranty may form the basis of an action for damages, but it does not normally entitle a non-contracting party to sue thereon. Therefore, the second appellant cannot sue on the two causes of action.

Per Mohamed Dzaiddin FCJ (dissenting)

[1] The second appellant was a director of the first appellant as well as one of the guarantors of the bridging loan upon which he was sued in the other suit. Clearly, the first appellant must not only be well aware of the proceedings in the other suit, but also have special interest in the outcome of the other suit. Hence, there is a privity of interest between the first and second appellant in the other suit.

[2] Comparing the second appellant's affidavit in reply in the other suit with the appellants' pleadings in this action, the issues pleaded are, in substance, the same. The second appellant, in the other suit, had actually raised the issues in the present proceedings, though in an oblique way.

[2a] The second appellant could have instructed their solicitors to raise the issue of negligent misrepresentation in the defence or plead it as a counterclaim in the other suit. He, as a director of the first appellant and one of the defendants in the other suit, was personally involved in the negotiations for the banking facilities on behalf of the first appellant. Hence, there was no excuse for him not to give proper and adequate instructions to the solicitors regarding the alleged representations made by the manager about the end-financing. Moreover, these facts were available at the time of the other suit.

[2b] The subject matter of the appellants' claim in the present proceedings could and should have been pleaded in the defence in the other suit or raised as a triable issue in the other suit. Thus, it would be an abuse of the process of the court to allow the first appellant to bring new proceedings in respect of the same issues which should have been litigated in the other suit.

[3] The critical question was whether Hong Leong was legally obliged to secure the syndication of the end-finance facility. The opening paragraph of the letter of offer states that the granting of both loan facilities was subject to compliance of the terms and conditions stipulated therein.

[3a] As the end-financing loan involves syndication, the approval of the said facility must be subject to the participation of other financial institutions and the execution of a participation agreement between the lead bank and each participating financial institution. Since the said syndication did not materialise and no agreement was executed between Hong Leong and other lenders, Hong Leong is not liable to the first appellant under the letter of offer.

[3b] Hong Leong was to provide RM5 million towards the end-finance facility. However, the release of this amount was subject to conditions provided for under the letter of offer, none of which were satisfied by the first appellant. Thus, the syndication did not go through not only because of lack of participation by financial institutions, but also non-fulfilment of conditions by the first appellant. For these reasons, the claim of negligent misrepresentation against Hong Leong based on the representations was not made out.

[4] As to the issue of collateral warranty, the key issue is whether the second appellant's evidence regarding what he gathered from the manager's alleged statement amounts to representation. From the evidence, the manager never represented to the second appellant about the certainty of Hong Leong securing the end-finance. What the second appellant said was to the effect that in the course of his discussions with the manager, he formed an impression that Hong Leong would not have any problem in securing the end-finance. This impression does not amount to a representation, nor can it be implied that a warranty had been given by the manager on behalf of Hong Leong.

[5] In order to establish a collateral warranty, the plaintiff has to establish, *inter alia*, that the relevant statement is promissory and not merely representational. The manager's statement or representation cannot be promissory in nature. For it to be converted into a promise, there ought to be clearer evidence about what was actually said. Here, what is in evidence is only the second appellant's impression.

[5a] In the course of their discussions regarding the entire bank loan, the second appellant must have known or presumed to know that in banking practice end-finance facility requires the approval of all participating financial institutions. At that point of time, neither party would have

known which banks or financial institutions would participate in the syndication. In such circumstances, it is unlikely for the manager, being an experienced banker, to give an assurance or promise that Hong Leong would secure the end-financing facility at whatever cost. Thus, the evidence regarding the manager's alleged representation contains no promissory element and therefore does not amount to a warranty.

[Appeal allowed; cross-appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu pertama adalah pemaju perumahan berlesen sedangkan perayu kedua adalah seorang pengarah perayu pertama. Bagi tujuan memajukan sebuah kawasan perumahan di atas sebidang tanah yang mereka miliki ('tanah tersebut'), perayu pertama telah berjaya merundingkan dengan responden pertama ('Hong Leong') untuk mendapatkan pinjaman penyambungan dan kemudahan-kemudahan pembiayaan akhir. Menurut perayu kedua, ketika perundingan dengan pengurus serantau selatan Hong Leong ('pengurus tersebut'), pihak terkemudian ini telah mengemukakan kepada beliau bahawa Hong Leong akan memberikan perayu pertama satu pinjaman penyambungan dan satu kemudahan pembiayaan akhir bersindiket yang akan diuruskan oleh Hong Leong. Jelasnya, pengurus tersebut telah menyatakan bahawa bagi sebuah syarikat kewangan yang mempunyai reputasi seperti Hong Leong, jumlah yang dipohon adalah 'peanuts'. Sejurus selepas itu, Hong Leong telah mengeluarkan sepucuk surat tawaran yang mana telah diterima oleh perayu pertama. Bahagian penting surat tersebut menyatakan, "Kami ... dengan sukacitanya mengesahkan bahawa Jawatankuasa pengurusan kami telah meluluskan Pinjaman Penyambungan tuan sebanyak RM3.5 juta dan Pembiayaan Akhir sebanyak RM26 juta tertakluk kepada terma-terma dan syarat-syarat yang berikut."

Pinjaman penyambungan tersebut telah dijamin oleh gadaian sah pertama ke atas tanah tersebut dan satu surat gerenti yang disempurnakan oleh kesemua pengarah-pengarah perayu pertama, termasuk perayu kedua. Berhubung kemudahan pembiayaan akhir, Hong Leong adalah dikehendaki menjadi pengurus bagi sindiket kemudahan-kemudahan tersebut sementara memberikan RM5 juta wangnya sendiri sebagai komitmennya sendiri terhadap perkara yang sama. Sebagai jaminan untuk RM5 juta yang diperuntukkan oleh Hong Leong, perayu telah menyempurnakan satu lagi surat gerenti. Ianya diterangkan bahawa Hong Leong telah mengirimkan cadangan-cadangan kepada institusi-institusi kewangan yang lain meminta mereka menyertai dalam pensindiketan pembiayaan akhir tersebut. Namun begitu, malangnya, usaha itu tidak mendapat sambutan dan oleh yang demikian keseluruhan persindiketan untuk pembiayaan akhir itu tidak menjadi kenyataan.

Walaupun pinjaman pemyambungan tersebut telah dibayar sepenuhnya kepada perayu pertama, kemudahan pembiayaan akhir, termasuk RM5 juta yang dijanjikan oleh Hong Leong tidak pernah diadakan. Berdasarkan representasi yang tersebut di atas oleh pengurus tersebut dan surat tawaran yang telah dikeluarkan oleh Hong Leong, perayu-perayu telah memulakan satu tuntutan untuk mendapatkan gantirugi yang menegaskan salah nyataan cuai dan/atau kemungkiran warati kolateral. Ianya ditegaskan bahawa Hong Leong adalah di bawah kewajipan untuk melaksanakan pengamatan yang wajar dalam membuat representasi tersebut tetapi sebaliknya, representasi tersebut telah dibuat secara cuai dan oleh yang demikian Hong Leong telah bertindak dalam kemungkiran kewajipan mereka. Berhubung penegasan alternatif mereka mengenai kemungkiran waranti kolateral, adalah ditegaskan bahawa representasi tersebut membentuk satu waranti kolateral oleh Hong Leong yang membawa kepada peruntukkan kemudahan-kemudahan pembiayaan akhir kepada perayu pertama. Disebabkan oleh kegagalan mereka untuk membuat peruntukan yang sedemikian, adalah dihujahkan bahawa Hong Leong telah bertindak dalam kemungkiran akan terma-terma waranti kolateral tersebut.

Responden-responden, sementara itu, berhujah bahawa surat tawaran tersebut dan penerimaannya kemudian tidak meletakkan Hong Leong di bawah satu kewajipan untuk menjamin persindiketan pembiayaan akhir itu terlaksana. Sebaliknya, mereka berhujah bahawa Hong Leong sebagai pengurus utama adalah hanya berkewajipan untuk mencuba bagi memperolehi kemudahan pembiayaan akhir itu dengan mendapatkan penyertaan institusi-institusi kewangan lain dalam sindiket tersebut. Lagipun, mereka menegaskan bahawa pensindiketan pinjaman tersebut adalah bersyarat ke atas pematuhan terma-terma dan syarat-syarat tertentu oleh perayu pertama, dan oleh kerana perayu pertama gagal berbuat demikian, adalah dihujahkan bahawa kewajipan Hong Leong untuk memperuntukan kemudahan pembiayaan akhir tersebut tidak berbangkit. Bertentangan dengan perkara ini, perayu-perayu menegaskan bahawa surat tawaran Hong Leong dan penerimaan oleh perayu pertama telah membentuk, antara lainnya, satu kewajipan kontraktual yang berlainan di pihak Hong Leong untuk memperuntukan kemudahan pembiayaan akhir bersindiket. Bagi menyokong penegasan ini, perayu-perayu berhujah bahawa mereka telah pun menyempurnakan satu gerenti sebagai jaminan untuk kemudahan pembiayaan akhir tersebut.

Selain daripada di atas, responden-responden menentang tuntutan perayu-perayu dengan alasan bahawa representasi tersebut bergantung kepada tanggapan yang diperolehi oleh perayu kedua berbanding kenyataan sebenar yang dibuat oleh pengurus. Tambahan, responden-responden juga menyoal keboleh-terimaan representasi-representasi lisan tersebut memandangkan s. 92 Akta Keterangan 1950 yang secara amnya melarang kemasukan pernyataan lisan di mana sesebuah kontrak telah diperturunkan dalam keadaan tertulis.

Perkara terakhir berhubung penegasan di dalam rayuan ini adalah di atas isu *res judicata.* Sebelum permulaan tuntutan ini oleh perayu-perayu, Hong Leong, di atas kegagalan perayu pertama membayar balik pinjaman penyambungan tersebut, berusaha untuk menguatkuasakan gerenti yang dikeluarkan bagi menjamin pinjaman tersebut. Satu writ terhadap penjamin-penjamin, termasuk perayu kedua telah dikeluarkan. Setelah mendengar hujahan dari kedua-dua pihak, Mahkamah Tinggi telah memberi penghakiman muktamad di bawah A. 14 Kaedah-kaedah Mahkamah Tinggi 1980 terhadap penjamin-penjamin ('guaman yang lain'). Ianya telah dihujahkan bahawa perayu pertama jelas sedar akan semua fakta pada waktu yang material itu oleh kerana perayu kedua telah pada setiap waktu yang material merupakan seorang pengarah perayu pertama. Berdasarkan perkara ini, responden-responden menegaskan bahawa terdapat priviti kepentingan di antara perayu pertama dan perayu kedua. Tambahan pula, responden-responden mendakwa bahawa isu-isu yang dibangkitkan oleh perayu-perayu dalam pernyataan tuntutan mereka dalam tindakan ini dan isu-isu yang dibangkit oleh perayu kedua di dalam afidavit jawapannya dalam guaman yang lain, bergantung kepada pembiayaan akhir yang tidak dibayar keluar atau dilepaskan. Pada hakikatnya, responden-responden mendakwa bahawa persoalan-persoalan mengenai salah nyataan cuai dan kemungkiran waranti kolateral telah pun dilitigasikan dalam guaman yang lain dan dengan itu perayu-perayu adalah diestop daripada membangkitkan isu-isu yang sama dalam tindakan ini. Perayu-perayu berhujah bahawa mereka tidak dihalang daripada mengemukakan tuntutan semasa ini sebagai satu tindakan yang berasingan. Pertamanya, mereka telah menuntut bahawa tiada priviti kepentingan wujud kerana tidak terdapat kepentingan bersama antara perayu-perayu pertama dan kedua. Perayu pertama bukannya merupakan satu pihak kepada dan tidak mempunyai kepentingan dalam guaman yang lain itu dan oleh itu tidak mungkin mereka membangkitkan kausa tindakan salah nyataan cuai dan kemungkiran waranti kolateral sebagai satu pembelaan atau tuntutan balas dalam guaman yang lain itu. Keduanya, telah dihujahkan bahawa guaman yang lain itu berkaitan dengan mendapatkan kembali jumlah yang terhutang di bawah pinjaman penyambungan sedangkan tindakan semasa tersebut merupakan tindakan salah nyataan cuai tort berhubung dengan pembiayaan akhir tersebut dan dengan itu, terdapat dua tindakan yang berbeza.

Bahagian-bahagian penting afidavit jawapan perayu kedua dalam guaman yang lain itu menunjukkan bahawa isu-isu yang dibangkitkan oleh beliau adalah, pertamanya, bahawa Hong Leong telah diestop atau ianya adalah tidak saksama bagi Hong Leong untuk menuntut jumlah yang dijamin akibat kegagalannya untuk melepaskan pembiayaan akhir tersebut dan, keduanya, bahawa beliau telah didorong untuk menandatangani gerenti tersebut berdasarkan surat tawaran tersebut dan representasi bahawa pembiayaan akhir itu akan diberikan.

Di Mahkamah Tinggi, hakim perbicaraan memutuskan bahawa perayu-perayu telah berjaya atas tuntutan utama mereka bagi salah nyataan cuai berhubung dengan kemudahan pembiayaan akhit tersebut. Ianya telah selanjutnya diputuskan bahawa representasi yang dibuat oleh pengurus berhubung dengan ketersediaan kemudahan pembiayaan akhir tersebut membentuk waranti kolateral dan bahawa perkara ini telah dimungkiri apabila tiada kemudahan pembiayaan akhir disediakan. Meskipun sedemikian, hakim perbicaraan telah menolak permohonan kerana doktrin *res judicata* atau isu estopel dalam ertikata yang lebih mendalam terpakai.

Perayu-perayu telah merayu terhadap penolakan tindakan tersebut sementara responden-responden pula telah merayu balas terhadap keputusan hakim perbicaraan berhubung isu-isu salah nyataan cuai dan waranti kolateral.

Diputuskan:
Oleh Lamin Mohd Yunus PMR (majoriti)

[1] Bahagian penting surat tawaran tersebut hanya memberi maksud bahawa kedua-dua perkara tersebut, iaitu pinjaman penyambungan dan pembiayaan akhir itu, telah diluluskan.

[2] Syarat pertama dalam surat tawaran tersebut menyatakan bahawa "total End-Financing facilities to be syndicated by HLFB" dan ini semestinya boleh menyampaikan maksud bahawa Hong Leong telah mengakujanji untuk menganjurkan dan mengadakan kemudahan-kemudahan tersebut.

[3] Representasi lisan pengurus yang menyokong kepastian ketersediaan pembiayaan akhir yang dimaklumkan melalui surat tawaran bersama-sama dengan fakta yang tidak dipertikaikan bahawa tiada pembiayaan akhir sama sekali telah disediakan semestinya membentuk satu kemungkiran yang penting oleh Hong Leong yang menyentuh dasar kontrak tersebut.

Oleh Chong Siew Fai HB (Sabah & Sarawak) majoriti

[1] Sejauhmana keputusan seseorang hakim perbicaraan merupakan satu keputusan fakta berdasarkan keterangan lisan yang dibentangkan dalam kehadiran, perilaku dan kebolehpercayaan saksi-saksi di hadapannya, mahkamah rayuan seharusnya mengikut pendapat hakim perbicaraan. Secara amnya, keputusan yang sedemikian tidak seharusnya diganggu melainkan jika mahkamah rayuan yakin bahawa ianya salah. Ianya tidak memadai untuk mewajarkan sebarang campur tangan semata-mata kerana mahkamah rayuan melayan keraguan samada keputusan yang sedemikian adalah betul.

[2] Adalah tidak boleh dinafikan setelah pembentukan surat tawaran bahawa pinjaman penyambungan dan pembiayaan akhir itu telah diluluskan dengan terma-terma dan syarat-syarat yang harus dipatuhi. Walaubagaimanapun, penegasan bahawa kelulusan tersebut adalah tertakluk kepada syarat-syarat tertentu atau syarat-syarat duluan tidak boleh dipertahankan.

[2a] Surat tersebut dengan jelasnya telah menyatakan bahawa Hong Leong telah "approved" pembiayaan akhir sebanyak RM26 juta. Tidak terdapat apa-apa dalam surat tersebut yang menandakan kelulusan telah diberikan tertakluk kepada apa-apa syarat duluan atau Hong Leong boleh mendapatkan pinjaman bersindiket tersebut atau seumpamanya. Dalam keadaan tersebut, kesemua terma-terma dan syarat-syarat yang sedemikian dalam surat tersebut berhubung dengan pengurusan pembiayaan akhir oleh Hong Leong, jumlah sepenuhnya pembiayaan akhir itu yang harus disindiketkan, dan penyertaan Hong Leong di dalamnya, telah memperkukuhkan penetapan bahawa pembiayaan akhir itu akan diberikan.

[3] Representasi lisan menyokong surat yang berkaitan mengenai kepastian ketersediaan pembiayaan akhir tersebut. Tiada pembiayaan akhir telah disediakan sama sekali dan pensindiketan itu gagal. Dengan itu, telah berlaku kemungkiran utama oleh Hong Leong yang menyentuh dasar kontrak tersebut.

[4] Sesuatu tanggapan, jika dibentuk dengan sempurna hasil daripada perundingan dengan seseorang, boleh membentuk asas sesuatu representasi. Jika terdapat sebarang keraguan, ianya adalah terletak pada pihak menentang untuk menguji ketepatan atau kesesuaian tanggapan yang didakwa itu.

[4a] Ianya bukan merupakan kesimpulan yang tidak adil atau tidak wajar bahawa apa yang dikemukakan telah memberikan tanggapan kepastian mengenai ketersediaan pembiayaan akhir tersebut.

[4b] Surat berikut yang meluluskan, antara lainnya, pembiayaan akhir tersebut secara pentingnya telah menyokong tanggapan berhubung dengan kepastian persetujuan kewangan tersebut.

[5] Bukti kecuaian melibatkan bukti mengenai kewajipan tertentu yang harus dilaksanakan oleh defendan kepada plaintif, kemungkiran akan kewajipan itu dan gantirugi kepada plaintif yang secara kausa dikaitkan dengan kemungkiran kewajipan untuk berjaga-jaga.

[6] Berhubung dengan pernyataan-pernyataan yang dibuat dalam perundingan-perundingan pra-kontraktual, jika pihak yang berkontrak itu adalah di bawah kewajipan berjaga-jaga dalam membuat pernyataan yang sedemikian, keingkaran akan kewajipan itu akan membawa kepada tanggungan dalam kecuaian tort.

[7] Sesuatu tindakan boleh diambil bagi mendapatkan gantirugi berhubung dengan sesuatu pernyataan silap yang telah dibuat dengan cuainya yang dengan itu telah menyebabkan kerugian wang kepada seseorang yang bergantung kepada pernyataan yang sedemikian melainkan tanggungjawab ditolak mengenai perbuatan pernyataan tersebut.

[8] Pengurus tersebut telah cuai ketika membuat pernyataan-pernyataan tersebut diatas yang mana perayu pertama telah bertindak dengan membuat permohonan pinjaman tersebut sehingga menjejaskannya.

[9] Peruntukan (b) kepada s. 92 Akta Keterangan 1950 menerima keterangan perjanjian lisan yang berasingan dalam keadaaan yang tertentu. Dalam mempertimbangkan samada peruntukan ini dapat digunakan, pertimbangan haruslah diberikan kepada surat perjanjian bertulis tersebut dan juga keadaan-keadaan disekelilingnya.

[9a] Dokumen dalam kes semasa ini adalah dalam bentuk sepucuk surat. Kepastian pembiayaan akhir dan ungkapan pengurus yang telah membangkitkan tanggapan mengenai kepastian yang sedemikian tidak terdapat dalam dokumen tersebut, kepastian kewangan tersebut juga konsisten dengan terma-terma dokumen. Oleh itu, peruntukan tersebut dapat digunakan.

[10] Berhubung waranti kolateral, persoalan yang berkaitan adalah samada pengurus telah mengemukakan kepada perayu kedua bahawa ketersediaan pembiayaan akhir adalah suatu kepastian. Oleh kerana persoalan ini telah dijawab dengan mengiakannya, representasi tersebut membawa kepada waranti kolateral. Dengan tidak mengadakan pembiayaan akhir itu, waranti kolateral tersebut telah dimungkiri dan ini telah menyebabkan kegagalan projek perumahan tersebut.

[11] Alasan-alasan atau sebab-sebab bagi keputusan dalam guaman yang lain itu tidak diekhsibitkan dalam kes ini. Dengan itu adalah tidak ditetapkan bahawa kedua-dua persoalan tersebut atau kausa tindakan dalam tindakan ini telah diadjudikasikan, bebanannya bergantung pada pihak yang mendakwanya.

[12] Afidavit jawapan perayu kedua dalam guaman yang lain menunjukkan bahawa isu-isu waranti kolateral dan kemungkirannya, dan salah nyataan cuai oleh Hong Leong tidak dibangkitkan dalam guaman yang lain itu, apatah lagi diadjudikasikan.

[12a] Tidak terdapat indentiti hal-perkara dan tiada kausa tindakan estopel dalam kes semasa. Isu-isu yang terdapat dalam guaman yang lain itu adalah samada terdapatnya estopel dan bahawa tandatangan yang dilakukan itu telah didorong oleh salah nyataan yang didakwa itu, jika ada. Persoalan-persoalan dalam kes semasa adalah samada pada satu tarikh yang lebih awal terdapatnya salah nyataan cuai dan samada representasi itu membentuk satu waranti kolateral dan kemungkirannya. Masa dan fakta-fakta yang membentuk latarbelakang persoalan-persoalan yang dibangkitkan dalam kedua-dua guaman ini adalah berlainan. Persoalan-persoalan dalam kes semasa berkaitan dengan perkara-perkara yang telah berlaku sebelum perkara-perkara berkenaan dengan isu-isu yang telah dibangkitkan dalam guaman yang lain itu.

[12b] Jawapan-jawapan, samada bersifat mengiakan atau secara negatif, kepada isu-isu dalam guaman yang lain itu tidak sepertinya bermakna jawapan-jawapan yang sama kepada kausa tindakan dalam kes semasa.

[12c] Berhubung dengan perayu pertama, ianya jelas tidak mungkin membangkitkan isu-isu yang membentuk kausa-kausa tindakan dalam kes semasa ini dalam guaman yang lain kerana ianya bukan merupakan satu pihak kepada guaman yang lain itu.

[13] Berhubung dengan isu samada perayu pertama merupakan satu privi kepada perayu kedua hinggakan diestop daripada mendakwa dalam tindakan ini, priviti yang relevan adalah priviti kepentingan.

[13a] Samada terdapatnya perhubungan yang memadai untuk membentuk priviti kepentingan akan bergantung atas pemeriksaan identiti kepentingan faktual akan pihak-pihak tersebut dan keadilan mengikat mereka dengan satu keputusan di mana mereka tidak diwakili.

[13b] Atas alasan yang diberikan di atas, termasuk juga bahawa perayu pertama bukannya merupakan satu pihak kepada guaman yang lain itu, maka tidak terdapat alasan yang sah bagi memutuskan bahawa perayu pertama berada dalam kepentingan priviti dengan perayu kedua dalam guaman yang lain itu atau bahawa mereka telah dikaitkan sedemikian bagi menjadikan doktrin *res judicata* terpakai.

[14] Sesuatu ejen yang telah memasuki kontrak bagi pihak utama yang didedahkan dan dinamakan tidak boleh, menurut aturan, mendakwa atas kontrak itu. Ini adalah sedemikian juga jika beliau merupakan pihak utama melainkan pihak yang lain itu dengan mengetahui mengenai fakta-fakta tersebut telah mengesahkan kontrak itu.

[14a] Perayu kedua, dengan pengetahuan Hong Leong, telah berunding sepanjang masa bagi perayu kedua. Hak tindakan yang disebabkan oleh waranti kolateral itu adalah bersifat peribadi antara kedua-dua pihak berkenaan yang berkontrak itu. Antara mereka, kemungkiran waranti akan membentuk asas bagi sesuatu tindakan untuk gantirugi tetapi ianya tidak biasanya membenarkan pihak yang tidak berkontrak itu untuk mendakwa ke atasnya. Dengan itu, perayu kedua tidak boleh mendakwa atas kedua-dua kausa tindakan tersebut.

Oleh Mohamed Dzaiddin HMP (menentang)

[1] Perayu kedua merupakan seorang pengarah perayu pertama dan juga merupakan salah seorang penggerenti pinjaman penyambungan tersebut di atas yang mana beliau telah didakwa dalam guaman yang lain itu. Jelasnya, perayu pertama semestinya bukan sahaja mengetahui mengenai prosiding dalam guaman yang lain itu, tetapi juga mempunyai kepentingan khas dalam hasil keputusan guaman yang lain itu. Dengan itu, terdapatnya priviti kepentingan antara perayu-perayu pertama dan kedua dalam guaman yang lain itu.

[2] Membandingkan afidavit jawapan perayu kedua dalam guaman yang lain itu dengan pliding perayu-perayu dalam tindakan ini, isu-isu yang diplidkan, menurut substans, adalah sama. Perayu kedua, dalam guaman yang lain, telah sebenarnya membangkitkan isu-isu dalam prosiding semasa, walaupun secara samar-samar.

[2a] Perayu kedua boleh mengarahkan peguamcara mereka untuk membangkitkan isu salah nyataan cuai dalam pembelaan atau memplidnya sebagai tuntutan balas dalam guaman yang lain itu. Beliau, sebagai pengarah perayu pertama dan seorang daripada defendan-defendan dalam guaman yang lain itu, adalah secara peribadinya terlibat dalam perundingan untuk kemudahan-kemudahan perbankan tersebut bagi pihak perayu pertama. Dengan itu, tiada alasan bagi beliau untuk tidak memberikan arahan-arahan yang sempurna dan memadai kepada peguamcara-peguamcara berhubung dengan representasi yang dikatakan telah dibuat oleh pengurus tersebut mengenai pembiayaan akhir tersebut. Lagipun, fakta-fakta ini tersedia ada ketika guaman yang lain itu dimulakan.

[2b] Hal perkara tuntutan perayu-perayu dalam prosiding semasa ini boleh dan seharusnya telah diplidkan dalam pembelaan dalam guaman yang lain itu atau dibangkitkan sebagai isu yang boleh dibicarakan dalam guaman yang lain itu. Dengan itu, ianya merupakan suatu penyalahgunaan proses mahkamah untuk membenarkan perayu pertama bagi memulakan prosiding baru berhubung dengan isu-isu yang sama yang mana seharusnya telah dilitigasikan dalan guaman yang lain itu.

[3] Soalan kritikal adalah samada Hong Leong telah secara sahnya wajib untuk mendapatkan pensindiketan kemudahan pembiayaan akhir tersebut. Perenggan pembukaan bagi surat tawaran tersebut menyatakan bahawa pemberian kedua-dua kemudahan pinjaman adalah tertakluk kepada pematuhan terma-terma dan syarat-syarat yang ditetapkan di dalamnya.

[3a] Oleh kerana pinjaman pembiayaan akhir itu melibatkan pensindiketan, kelulusan kemudahan tersebut semestinya tertakluk kepada penyertaan institusi-institusi kewangan yang lain dan penyempurnaan perjanjian penyertaan antara bank utama dan setiap satu institusi kewangan yang menyertai. Oleh kerana pensindiketan itu tidak menjadi kenyataan dan tidak ada perjanjian disempurnakan antara Hong Leong dan pemberi-pemberi pinjaman yang lain, Hong Leong adalah tidak bertanggungan kepada perayu pertama di bawah surat tawaran tersebut.

[3b] Hong Leong sepatutnya memberikan RM5 juta bagi kemudahan pembiayaan akhir itu. Walaubagaimanapun, pelepasan atau pembayaran keluar jumlah ini adalah tertakluk kepada syarat-syarat yang diperuntukan di bawah surat tawaran tersebut, tidak satu pun daripadanya dilaksanakan oleh perayu pertama. Dengan itu, pensindiketan itu telah gagal bukan sahaja kerana ketiadaan penyertaan oleh institusi-institusi kewangan, tetapi juga kerana syarat-syarat yang tidak dipenuhi oleh perayu pertama. Atas alasan ini, tuntutan salah nyataan cuai terhadap Hong Leong berdasarkan representasi itu telah tidak dilaksanakan.

[4] Berhubung dengan isu waranti kolateral, isu utama adalah sama ada keterangan perayu kedua mengenai apa yang telah diperolehi beliau daripada kenyataan pengurus yang didakwa itu membawa kepada representasi. Daripada keterangan tersebut, pengurus itu telah tidak pernah mengemukakan kepada perayu kedua mengenai kepastian Hong Leong memperolehi pembiayaan akhir tersebut. Apa yang dikatakan oleh perayu kedua adalah hakikat bahawa dalam perjalanan perundingan dengan pengurus, beliau telah membentuk tanggapan bahawa Hong Leong tidak akan mempunyai masalah dalam memperolehi pembiayaan akhir itu. Tanggapan ini tidak membawa kepada sebarang representasi, mahupun boleh ianya menyatakan bahawa satu waranti telah diberikan oleh pengurus tersebut bagi pihak Hong Leong.

[5] Bagi menetapkan waranti kolateral, plaintif haruslah menentukan, antara lainnya, bahawa kenyataan yang relevan adalah janji hutang dan bukan semata-mata satu representasi. Kenyataan pengurus atau representasi tidak boleh bersifat janji. Untuk ditukarakannya menjadi janji, seharusnya terdapat keterangan yang lebih jelas mengenai apa yang sebenarnya telah dikatakan. Di sini, apa yang terdapat dalam keterangan adalah hanya tanggapan perayu kedua.

[5a] Dalam perundingan mereka mengenai keseluruhan pinjaman bank tersebut, perayu kedua semestinya telah mengetahui atau dianggapkan mengetahui bahawa dalam amalan perbankan kemudahan pembiayaan akhir memerlukan kelulusan kesemua institusi kewangan yang menyertai. Pada masa itu, mana-mana satu pihak pastinya tidak dapat mengetahui bank atau institusi kewangan yang mana akan menyertai dalam pensindiketan itu. Dalam keadaan yang sedemikian, ianya tidak berkemungkinan bagi pengurus tersebut, sebagai seorang jurubank yang berpengalaman, untuk memberikan satu kepastian atau janji bahawa Hong Leong akan memperolehi kemudahan pembiayaan akhir walaubagaimana sekalipun. Dengan itu, keterangan berhubung dengan representasi pengurus yang didakwa itu tidak mengandungi sebarang unsur janji dan dengan itu tidak membawa kepada satu waranti.

[Rayuan dibenarkan; rayuan balas ditolak.]

Cases referred to:

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Benmax v. Austine Motor Co [1955] 1 All ER 326 ***(cit)***
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Box v. Midland Bank Ltd [1979] 2 Llyod's Rep 391 ***(refd)***
Brisbane City Council v. A-G for Queensland (PC) [1978] 3 WLR 299 ***(refd)***
Carl Zeiss Stiftung v. Rayner and Keeler Ltd (No 2) [1967] 1 AC 853 ***(refd)***
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Chin Sin Motor Works Sdn Bhd & Anor v. Arosa Development Sdn Bhd & Anor [1992] 1 CLJ 102 ***(cit)***
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Nouvion v. Freeman (15 App Cas 1, 9) ***(refd)***
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TP Jordeson & Co and Kahn v. London Hardwood Co Ltd [1913] 110 LT 666 ***(cit)***
Yat Tung Investment Co Ltd v. Dao Heng Bank Ltd [1975] AC 581 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 92
National Land Code 1965, s. 256
Rules of the High Court 1980, O. 14
Rules of the Supreme Court [UK], O. 18 r. 19

Other sources referred to:
Halsbury's Laws of England, 4th edn, vol 16, p 874, paras 990-991
Legal Aspect of Syndicated Loan, Gabriel, p 115
Loan Syndication, The Placing Memorandum and its implications for the Managing or Lead Bank, Anthony Lim Wee Teck [1982] 2 MLJ lix
Negligence, Charlesworth & Percy, 8th edn, p 83
Res Judicata, Spencer-Bower & Turner, 2nd edn, p 209

For the appellants - Manjit Singh (Fiona Bodipalar with him); M/s Sri Ram & Co
For the respondents - Cecil Abraham (RS Nathan with him); M/s Shearn Delamore & Co

[Appeal from High Court, Kuala Lumpur; Civil Suit No: D2-22-150-88]

Reported by S Dharmendran

JUDGMENT

Lamin Mohd Yunus PCA:

I have had the opportunity of reading the draft judgments of my learned brothers Chong Siew Fai, CJ (Sabah & Sarawak) and Mohamed Dzaiddin FCJ.

My learned brother Mohamed Dzaiddin, FCJ concluded that the plaintiffs' appeal should be dismissed and the defendants' cross-appeal be allowed. My learned brother Chong Siew Fai, CJ (Sabah & Sarawak) on the other hand chose to allow the 1st plaintiff's (Kluang Wood) appeal and that damages be assessed. As for Chew, the 2nd plaintiff, his action was to stand dismissed. The cross-appeal by the 1st defendant (Hong Leong Finance) (to the extent relating to Kluang Wood) be dismissed.

As for myself, I am inclined to agree with the finding of my learned brother Chong Siew Fai, CJ (Sabah & Sarawak) and his reasoning in this appeal. However may I take the liberty to observe on the construction of the letter dated 26 October 1983 (AB 17-22) which was central to the issues raised in this appeal. My learned brother Mohamed Dzaiddin, FCJ said that the critical question here was whether the 1st defendant was legally obliged to secure the syndication of the end-financing of RM26 million. With the greatest of respect, the management committee approved both the Bridging Loan and the End-Financing. The opening paragraph of the aforesaid letter is quite clear for it states:

> We refer to your loan application and are pleased to confirm that our Management Committee has approved your Bridging Loan of M$3.5 million **and** End-Finance of M$26 million subject to the following terms and conditions: (Bold is mine)

I fail to appreciate how this sentence is to be read otherwise that the approval of the two items namely:

> the Bridging Loan of M$3.5 million and End-Finance of M$26 million ...

The clear wording of the approval must be given effect to. The aforesaid letter of 26 October 1983 further stipulates the following conditions:

> Total End-Financing facilities **to be syndicated by HLFB** is M$26 million. HLFB will provide facilities of up to M$5.0 million. (Bold is mine)

The first condition states that the "total end-financing **facilities to be syndicated** by HLFB" and this, in my view, must be capable of conveying the meaning that the 1st defendant (HLFB) undertook to organise and to make available the said facilities. The aforesaid condition does not state that the 1st defendant "shall endeavour" to organise and to make available the required syndicated loans. Pang's oral representation substantiated by the certainty of availability of the end-finance conveyed by the letter of 26 October 1983

together with the undisputed fact that no end-finance at all was available must necessarily constitute a fundamental breach by the 1st defendant (HLFB) that went to the root of the contract. In effect therefore the finding of the learned trial judge was not really misconceived.

With regard to the defence of *res judicata*, I say nothing more as I am in complete agreement with my learned brother Chong Siew Fai, CJ (Sabah & Sarawak). So also in regard to the costs of this appeal.

Chong Siew Fai CJ (Sabah & Sarawak):

I have read the judgment of my learned brother, Mohamed Dzaiddin, FCJ. With regret, I find myself unable to agree with him except on the issue of liability relating to the initial drawdown on the end-finance. In the circumstance, it is necessary that I set out the reasons for my decision.

Background Facts

The 1st appellant, Kluang Wood Products Sdn. Bhd. (Kluang Wood), was a licensed developer and the registered proprietor of all that parcel of land held under Johore Grant No. 2365 for Lot No. 506 in the district of Johore Bahru (hereinafter referred to as the "said land"). The 2nd appellant, Chew Beng Gim, (deceased and represented by his personal representative in this appeal) was a director of Kluang Wood.

In 1983, Kluang Wood was desirous of developing the said land into a housing project to be known as Taman Mewah comprising of 489 units of different types of houses. The project was expected to be completed at the end of 1985. To that end, Chew Beng Gim (Chew) managed to get introduced to one W.P. Pang (Pang) who, at the material time, was the southern regional manager of the 1st respondent, Hong Leong Finance Berhad (Hong Leong), with a view to negotiating the financing of the Taman Mewah project. They met in July/August 1983.

According to Chew (PW1), during the negotiation between him and Pang, the latter agreed that Hong Leong would furnish Kluang Wood with a bridging loan and a syndicated end-finance with Hong Leong taking the lead. Pang had represented to him in the course of their negotiation that for a finance company of Hong Leong's repute, the amounts of the end-finance and the bridging loan would be "peanuts". Chew also said that the date of the drawdown of the end-finance was also discussed and the first drawdown thereof was expected to be in the first quarter of 1984.

Following the negotiation, Hong Leong issued a letter of offer dated 26 October 1983 which was accepted by Kluang Wood on 28 October 1983. The

material parts of the letter reads:

HONG LEONG FINANCE BERHAD
(Ditubuhkan di Malaysia)

26 October 1983
M/s Kluang Wood Products Sdn. Bhd.
4th Floor, SPPL Building
315, Alexandra Road,
Singapore 0315

Dear Sirs

Re: Bridging Loan Of M$3.5 Million And End-Finance Of M$26 Million

We refer to your loan application and are pleased to confirm that our Management Committee has approved your Bridging Loan of M$3.5 million and End-Finance of M$26 million subject to the following terms and conditions:

1) For Bridging Loan

Loan Amount : M$3.5 million

Duration : 24 months from-the date of first drawdown.

Security : The Bridging Loan shall be secured by:

(a) A first fixed charge under the National Land Code on the 32.325 acres of land to be developed and known as Johore Grant No. 2365 Lot No. 1466, District of Johore Bahru. When individual titles are available, the Bridging Loan shall be secured by first fixed charge over the 498 titles.

(b) Joint and several guarantee of all the following persons:

i) Ong Tiong Soon

ii) Chew Beng Gim

iii) Leonard Cheng Tye Loke.

iv) Peter Gan Siew Chong

v) Yap Teck Lock

vi) Yap Teck Huat

(c) Full and unconditional guarantee of Feng Yuan Holding Pte. Ltd.

...

a

Repayment	:	Payments of monthly interest on the amount drawdown shall begin one month after the loan amount is released in part or in full to you or on your behalf

...

b

II) For End Finance

Manager	:	Hong Leong Finance Berhad will be the manager for the syndication of End-Financing facilities of M$26 millon to Kluang Wood Products Sdn. Bhd. to finance the individual purchasers of Taman Putri. In addition, HLFB will also participate in the syndicated loan.

c

Amount of Facility	:	Total End-Financing facilities to be syndicated by HLFB is M$26 million. HLFB will provide facilities of up to M$5.0 million.

d

Purpose of Facility	:	To finance the individual purchasers of the residential and shophouses in Taman Putri.

Interest Rate	:	For houses selling below $100,000-00 - 10% p.m. on yearly rest basis.

e

For houses selling about $100,000-00
- 13.5% p.m. on yearly rest basis.

For shophouse
- 14% p.m on yearly rest basis.

f

Duration	:	For Housing Loan – maximum of 15 years. For Mortgage Loan – maximum of 10 years.

...

g

Participation Fee	:	A participation fee of 0.5% flat on the loan amount participated shall be payable to each lender in respect of its participation in the syndication.
Management Fee	:	0.5% of total loan amount syndicated (i.e. 0.5% of M$26 M = $130,000) payable to HLFB upon execution of Master Agreement.

h

...

Drawdown	:	Loan to individual purchaser will be drawn in proportion to the work-in-progress as certified by the Project's Architect. Before the drawdown of each loan, the developer has to confirm that the purchaser has paid the difference between

i

the selling price and the loan amount. The final disbursement shall only be made upon issue of the Certificate of Fitness from the relevant authority.

Repayment : The Principal and interest repayment of each individual loan shall be by equal monthly installments over the period of the loan commencing one month from the date of full disbursement of the loan.

Security: (a) Loan Agreement between purchaser and end-financier.

(b) Assignment of the Sale & Purchase Agreement between purchaser and developer to HLFB.

(c) A first legal charge under the National Land Code over the respective lot upon issue of individual qualified title.

Special Condition of Approval : HLFB reserves the right to alter the above stated terms and conditions as and when deem necessary and to accept or reject each application for end-finance facility according to its merits and demerits.

Please note that the above offer will remain open for acceptance for 1 month i.e. until 26th November, 1983. If we do not receive your signed copy of this letter accepting the offer, it will be deemed to have lapsed and new terms will have to be renegotiated.

If the above terms and conditions are acceptable to you, kindly confirm acceptance to our offer by signing and returning the duplicate copy of this letter.

Yours faithfully
For Hong Leong Finance Berhad
Johore Bahru Branch,

Signed:
Chuang Siow Hwee
Branch Manager

I/We confirm acceptance of the above

(Signed)
...
for & on behalf of Kluang Wood Products Sdn Bhd

c.c Credit Evaluation Dept.

It was the case of Kluang Wood that by the above letter, Hong Leong had expressly or by necessary implication represented to Kluang Wood that:

(a) a bridging loan of M$3.5 million had been approved; and

(b) that an end-finance facility of M$26 million had been approved, which facility to be syndicated by Hong Leong would be managed by Hong Leong and made available for the benefit of the purchasers of the houses to be built under the project. Kluang Wood also pleaded that Hong Leong had further represented that the initial drawdown of the said end-finance facility would be in the first quarter of 1984.

It was undisputed that initially Kluang Wood applied for M$4.5 million bridging loan and M$21 million end-finance but was instead approved M$3.5 million bridging loan and M$26 million end-finance. As security for the bridging loan, Kluang Wood created a charge dated 29 October 1983 over the said land in Hong Leong's favour. An added security was also furnished by Kluang Wood's directors, including Chew, by way of a joint and several guarantee dated 29 October 1983.

It was also not disputed that the end-finance of M$26 million was not provided. For reasons which I do not consider it necessary to set out here, the efforts of Hong Leong to syndicate the end-finance fell through though for the M$5 million being Hong Leong's share of the end-finance as stated in the letter dated 26 October 1983, Chew had executed a guarantee on 16 November 1984. As it turned out, however, no end-finance at all including the M$5 million supposed to come from Hong Leong was made available to Kluang Wood though the bridging loan of M$3.5 million had been fully utilised by Kluang Wood.

On 8 May 1985, Hong Leong took out a writ (Civil Suit No. 354 of 1985) in the Johor Bahru High Court against the guarantors including Chew for recovery of the bridging loan (hereinafter referred to as the "Johor Bahru suit").

On 5 March 1986 Hong Leong obtained a summary judgment under O. 14 of Rules of the High Court 1980 against the guarantors including Chew for the sum of RM3,673,051.50.

On 16 May 1985 Hong Leong enforced the charge on the said land against Kluang Wood by Originating Summons No. 210/85 in Johor Bahru. Kluang Wood did not enter appearance nor resisted the action. An order for sale of the said land was made by the High Court of Johor Bahru, and subsequently a date was fixed for sale of the said land by way of public auction. The

auction sale was aborted a few times and each time a new date was fixed with reduced reserve price (M$5 million, initially). The said land was sold to the 2nd respondent, Pelita Terang Sdn. Bhd., a subsidiary of Hong Leong, for M$3.2 million.

Against this background, Kluang Wood and Chew commenced the present action (subject-matter of this appeal) against Hong Leong and Pelita Terang Sdn. Bhd., the successful purchaser of the said land.

The Present Action

Essentially, the claims of Kluang Wood and Chew were twofold:

Firstly, they claimed that Hong Leong's failure to provide the end-finance of M$26 million as represented in its letter dated 26 October 1983 caused the failure of their Taman Mewah project and also disabled Kluang Wood from servicing the interest on the bridging loan. They further alleged that Hong Leong was negligent and acted in breach of its duty when it represented to Kluang Wood that the end-finance of M$26 million would be made available to house buyers of Taman Mewah and that the first drawdown thereof would be in the first quarter of 1984. They also relied on the letter dated 26 October 1983 (materially reproduced above) to substantiate their case of Hong Leong's commitment to making the bridging loan of M$3.5 million and an end-finance of M$26 million available. Paragraph 7 of the re-re-amended statement of claim reads:

> By a letter dated the 26 day of October, 1983 the 1st Defendant (Hong Leong) expressly or by necessary implication represented to the 1st plaintiff (Kluang Wood) as follows:
>
> (a) that a bridging loan of $3.5 million in favour of the 1st plaintiff had been approved; and
>
> (b) that a syndicated end-financing facility of $26 million to be managed by the 1st Defendant will be made available for the benefit of the purchasers aforesaid. (brackets added).

In the alternative Kluang Wood and Chew pleaded that the aforesaid representations of Hong Leong constituted a collateral warranty that Hong Leong would provide the end-finance of M$26 million to Kluang Wood and that in breach of the said warranty Hong Leong had caused them loss and damage estimated at M$13 million.

The second claim of Kluang Wood and Chew related to the sale of the land to Pelita Terang Sdn. Bhd. by auction. They alleged that Hong Leong had acted in bad faith and/or fraudulently in the exercise of its power of sale in

that, *inter alia,* it had at all times formed the intention to purchase the said land by itself or through the agency of another and had, through its inside knowledge of the reserve price of the said land, waited until the reserve price was M$3.2 million before getting its subsidiary, Pelita Terang Sdn. Bhd., to bid at the fifth and final public auction of the said land. Kluang Wood and Chew contended that Pelita Terang Sdn. Bhd. aided and/or abetted in the commission of the fraudulent acts of its holding company, Hong Leong. In the alternative, Kluang Wood and Chew alleged that Hong Leong was under a legal duty to exercise reasonable care and skill when exercising its power of sale and at all material times had acted in breach of that duty, resulting in loss and damage to Kluang Wood and Chew. At the trial, the learned trial judge dismissed this claim. In the course of this appeal before us, Kluang Wood and Chew abandoned this part of their appeal. Hence no more need be said about it except for costs which I propose to deal later.

Defence Of Hong Leong And Pelita

Hong Leong and Pelita Terang Sdn. Bhd. launched a three-pronged defence. Firstly, they contended that the failure of Kluang Wood's Taman Mewah project was due to the latter's own mismanagement and poor planning. Secondly, they denied that the letter dated 26 October 1983 had expressly or impliedly represented as alleged or that the representations, if existed, would constitute the collateral warranty and breach thereof as alleged. Thirdly, they pleaded that Kluang Wood and Chew were estopped from maintaining the claim on the grounds that the issues raised had already been litigated in the Johor Bahru suit, and that Chew being a director of Kluang Wood, Kluang Wood was well aware of all the facts at the material times.

The Learned Trial Judge's Judgment

In her judgment the learned trial judge found Pang had the authority to approve loans on behalf of Hong Leong. She held that based on the totality of the oral and the documentary evidence, Hong Leong had represented to Kluang Wood that availability of the end-finance was certain, that the first drawdown thereof would be in the first quarter of 1984, and that Pang of Hong Leong had been negligent in making the representations. The learned trial judge also held that Pang's oral representations constituted a collateral warranty, which was breached, when no part of the end-finance came from Hong Leong.

However, despite the above findings, the learned trial judge held that Hong Leong's plea of *res judicata* succeeded in that the claims of Kluang Wood and Chew in this action on negligent misrepresentations and alternatively for breach of collateral warranty could not be litigated upon because there was

privity of interest between Kluang Wood and Chew in the Johor Bahru suit, Chew being a director and agent of Kluang Wood. She held that *res judicata* applied "to put an end to any further proceedings between the same parties based on the same facts which had already been litigated before or could have been raised and litigated in the earlier civil suit." (ie, the Johor Bahru suit). The learned trial judge, accordingly, dismissed the action by Kluang Wood and Chew with costs.

Bridging Loan

Before dealing with this appeal, one point may conveniently be disposed of ie, reasons for Kluang Wood's failure to service the bridging loan. Whilst Kluang Wood attributed the failure to the unavailability of the end-finance as allegedly promised by Hong Leong, Hong Leong contended that the failure was due to poor planning and mismanagement of the project by Kluang Wood. The learned trial judge upon a review of the relevant evidence rejected, in my opinion justifiably, the contention of Hong Leong that poor planning and mismanagement was the cause. There is ample material justifying the conclusion of the learned trial judge in this regard. The evidence of Chew (PW1) showed that in the 1st quarter of 1984 Kluang Wood had secured 47 buyers, and by December 1985, they had 116 purchasers, some of whom continued with their purchases of houses despite the unavailability of the end-finance from Hong Leong. Chew also testified that Kluang Wood completed works on 325 units in phase 1 of the project with an estimated work value of M$8 million. For the purpose of this appeal, however, it is unnecessary to deal with the point as to whether the failure to service the bridging loan was due to the unavailability of the end-finance. Judgment had already been entered on the bridging loan in the Johor Bahru suit. Even the land charged as security for the bridging loan had been sold in the Originating Summons proceedings. Therefore, in the treatment of this appeal and the cross-appeal, I do not propose, unless required in the context, to dwell upon submissions of counsel in this respect.

Appeal And Cross-Appeal

Against the dismissal of the action, Kluang Wood and Chew appealed. Hong Leong and Pelita Terang also cross-appealed.

Before dealing with the appeal and the cross-appeal, I remind myself of the general principle that in so far as the conclusion of a trial judge is a finding of fact on the oral evidence set in the appearance, demeanors and credibility of the witnesses before him or her, the appellate court should normally defer to the opinion of the trial judge. Generally, such finding ought not be disturbed unless the appellate court is convinced that it is wrong. It would not be

sufficient to warrant any interference merely because the appellate court entertains doubt whether such finding is right *Antonio D. Caldeira v. Frederick A. Gray* [1936] MLJ Rep. 137.

In *Chow Yee Wah & Anor v. Choo Ah Pat* [1978] 2 MLJ 41 the Privy Council approved the following test respecting appellate intervention expressed by Lord Shaw in *Clarke v. Edinburgh Tramways Co.* [1919] SC (HL) 35 at 36:

> In courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate court? In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I – who sit here without those advantages, sometimes broad and sometimes subtle, which are the priveleges of the judge who heard and tried the case – in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

See also *Thomas v. Thomas* [1947] AC 484 @ 487-488 per Lord Thankerton and *Benmax v. Austine Motor Co.* [1955] 1 All ER 326 @ 329 per Lord Reid respecting the proper function of an appellate court in dealing with findings of fact by a trial judge.

The cross-appeal of Hong Leong and Pelita Terang is against the findings of the learned trial judge that:

(1) Kluang Wood's inability to service the interest on the bridging loan was due to Hong Leong's failure to secure and provide the end-finance (I have earlier dealt with this herein);

(2) the agreement between Hong Leong and Kluang Wood contained in the letter dated 26 October 1983 placed upon Hong Leong an obligation to secure and provide end-finance to the extent of M$26 million, M$5 million or at all;

(3) Pang had represented the provision of end-finance and that it would be a certainty, considering that such representations were at variance with the agreement dated 26th October 1983;

(4) the representations were negligently made and/or were capable in law of giving rise to a collateral warranty.

Another ground of the cross-appeal contended that the learned trial judge had erred in relying on oral representations in excess of what had been pleaded particularly that the pleadings limited oral representations to the issue of the date of initial drawdown of the alleged end-finance facility. Since no submission was advanced before us by counsel on this ground, I take it that it had been abandoned. However, I would venture to say that I do not think the pleading had expressly rested the issue of the initial drawdown on oral representation though as the evidence unfolded this happened to be the case. See para. 7A of the re-re-amended statement of claim which does not expressly plead that the representation was oral. Kluang Wood had also pleaded representation, express or implied, about the approval and availability of the end-finance by virtue of the letter dated 26 October 1983. This representation, even by implication, is well grounded by the said letter. The impression about certainty of the end-finance which was evidentially derived from the negotiation between Chew and Pang went to support the representation by the letter as pleaded. The learned trial judge came to the conclusion about certainty of the availability of the end-finance based on both oral and documentary evidence (see p. 91 of the appeal record). In the circumstance I do not think the conclusion can be said to have so drastically departed from the pleading as meriting it to be totally disregarded or set aside, though, admittedly, the pleading could have been settled with better clarity.

The cross-appeal also contended that the learned trial judge had failed to consider adequately or at all:

(a) the lack of committed purchasers for the housing project;

(b) Kluang Wood's inability to prove saleability of the project;

(c) that the agreement contained in the letter dated 26 October 1983 between Kluang Wood and Hong Leong was conditional upon matters which were not fulfilled;

(d) Kluang Wood's and Chew's mismanagement of the project (already dealt with herein earlier).

I would straightly deal with these complaints and hold that points (a), (b) and (d) are without merits. They had been adequately considered by the learned trial judge (See pp. 66, 74 to 77 of the appeal record). The learned trial judge had in fact held that the allegations of poor management and poor planning on the part of Kluang Wood had not been made out. As regards point (c), it cannot be denied upon construction of the letter that the bridging loan and the end-finance were approved with terms and conditions to be complied. This clearly was in the mind of the learned trial judge. (See p. 64 of the appeal record). More will be said in this regard. But if, by point (c), it was intended

to argue that the approval was subject to certain condition or conditions precedent, I do not find the contention tenable.

It was also contended that the learned trial judge had erred in holding that the architect's obligation to provide architect's certificates was dependent on the availability of the end-finance. To fully appreciate the reasoning of the learned trial judge, it would be necessary to quote the whole paragraph of the judgment. This appears on p. 80 of the appeal record which reads:

> My answer to this objection is that the obligation to provide the architect's certificates had not arisen at all as no end finance had been provided. If the end finance was available, I am sure that the 1st plaintiff would have procured the necessary architect's certificates and submitted them to the 1st defendant for the release of the money as is the accepted practice recognised in the building industry.

The holding of the learned trial judge relates to Hong Leong's complaint about the absence of architect's certificates showing the stages of works completed. (See pp. 79 and 80 of the appeal record). It is important to note that the contention related to the standardised sale and purchase agreements between the various purchasers and Kluang Wood (more particularly cl. 4(2) thereof) as opposed to Hong Leong's letter of approval dated 26 October 1983. Clause 4(1) stipulated instalment payments of the purchase price in accordance with the "Third Schedule" none of which, unfortunately, was included in the appeal record. All the sale and purchase agreements were concluded on different dates from the later part of February 1984 till as late as December 1985 (See pp. 722-1054 of the appeal record). This is a case where the provision of the end-finance had totally failed. In the light of the circumstances, I do not think it can be said that the learned trial judge had erred in holding as stated above.

The appeal and the cross-appeal ie, those grounds not yet disposed of earlier herein may conveniently be dealt with under three heads:

(1) The existence or otherwise of Hong Leong's contractual obligation to provide the end-finance;

(2) were there negligent misrepresentations, collateral warranties, and breach thereof by Hong Leong?

(3) availability of *res judicata* or issue estoppel as a defence.

(1) Contractual Obligation

Mr. Manjit Singh submitted before us that Hong Leong's letter of offer dated 26 October 1983 and Kluang Wood's acceptance thereof constituted, *inter alia*,

a distinct contractual obligation on the part of Hong Leong to provide a syndicated end-finance of M$26 million of which Hong Leong would take participation of M$5 million. In support thereof, he alluded to the guarantee executed by the directors of Kluang Wood (including PW1 Chew) for Hong Leong's own contribution of M$5 million towards the end-finance. Mr. Cecil Abraham for Hong Leong, on the other hand, contended that Hong Leong's obligation was only to provide the bridging loan and that as for the end-finance, there were terms and conditions with which Kluang Wood must first comply before Hong Leong's obligation to provide it arose, one of which was said to be that Kluang Wood must produce the architect's certificate showing the work progress before the end-finance would be released and that since none was shown, Hong Leong's obligation for a drawdown did not arise.

Upon review of the totality of the oral and the documentary evidence adduced, the learned trial judge found that Hong Leong had represented to Kluang Wood that availability of the end-finance was a certainty and that the first drawdown would be in the first quarter of 1984. (I shall deal with this latter finding later). And, based on the agreement contained in Hong Leong's letter dated 26 October 1983 and the guarantee dated 16 November 1984 in favour of Hong Leong respecting the M$5 million being part of the end-finance, the learned trial judge held that Hong Leong Finance was contractually bound to provide its contribution of the end-finance but had failed to do so.

Hong Leong's contractual obligations could properly be ascertained from its letter of offer dated 26 October 1983 which Kluang Wood had accepted. The letter as accepted by Kluang Wood clearly showed Hong Leong's commitment to the end-finance of M$26 million to be syndicated by Hong Leong and in which Hong Leong would participate M$5 million. Indeed the terms and conditions relating to the end-finance and contained in the said letter are clear leaving no room for surmise on Hong Leong's obligation to make available the end-finance to Kluang Wood through syndication and Hong Leong's participation of M$5 million. The letter clearly stated that Hong Leong had "approved" the end-finance of M$26 million. There is nothing in the letter indicating the approval being subject to any condition precedent or to Hong Leong being able to get the syndicated loan or the like. In the circumstance, all such terms and conditions in the letter relating to the management of the end-finance by Hong Leong, total amount of the end-finance to be syndicated, and Hong Leong's participation therein, reinforce the stipulation that the end-finance would be furnished.

(2) Any Negligent Misrepresentations, Collateral Warranty And Breach Thereof

To recapitulate, it was not disputed that there had been negotiations for end-financing between Chew and Pang in July/August, 1983. The impugned representations contended to have been made by Pang to Chew (PW1) were, in essence, that for a financial institution like Hong Leong to procure a syndicated end-finance of M$21 million (the amount mentioned during the discussion, as the evidence shows) would present no problem and that the first drawdown of the end-finance would be in the first quarter of 1984. It is in the evidence of Chew that Pang had told him that the total amount including the bridging loan and the end-finance was peanuts for Hong Leong and would pose no problem, that the assurance as to the availability of the syndicated loan by Pang was not, in any way, qualified, and that, relying on the aforesaid representations, Kluang Wood applied for and obtained approval of the facilities including the availability of the syndicated end-finance of M$26 million of which Hong Leong itself would contribute M$5 million.

Chew was not challenged about Pang making the representations nor was there any cross-examination thereon. Pang did not give evidence. Regarding the whereabouts of Pang, the learned trial judge was critical of the lack of evidence as to when it became apparent that Pang could not be traced and also of the lack of evidence on the efforts made to trace him.

On the evidence as adduced, the learned trial judge, in my opinion, was justified in concluding that Pang had made the representations and that they were "unrebutted and unchallenged."

As regards Pang's representation that the first drawdown of the end-finance would be in the first quarter of 1984, I agree with my learned brother Mohamed Dzaiddin J that no liability could be attached to Hong Leong. The essence here is the timing ie, the first quarter of 1984. Under the heading "drawdown" contained in the subsequent letter of Hong Leong dated 26 October 1983 and accepted by Kluang Wood, it was stipulated, *inter alia*, that the end-finance would be "drawdown in proportion to the work-in-progress as certified by the Project's Architect." According to Chew's evidence, the drawdown for the first quarter would be in the region of M$1,072,200. Hong Leong's own share in the end-finance was M$5 million. But there is no evidence showing that the architect's certificate required under the said letter had been issued. On the evidence, the benefit of doubt ought, in my opinion, be given to Hong Leong in that the first drawdown might have been furnished had the requisite certificate been issued. Therefore, it is my view that in so far as there had been no first drawdown of the end-finance in the first quarter of 1984 as represented, no blame ought to be attributed to Hong Leong.

It may be convenient to state here, however, that the above reasoning does not hold good for Hong Leong's total failure of making available the end-

finance **after** the first quarter of 1984. In this regard different considerations apply. Here the oral representation substantiated by the letter dated 26 October 1983 related to the certainty of availability of the end-finance without reference to any specific time. It is not disputed that no end-finance at all was available to Kluang Wood and there is evidence that the syndication fell through. This became obvious after the first quarter of 1984. Therefore, there had been a fundamental breach by Hong Leong that went to the root of the contract. It is in the evidence of Chew that the end-finance was, at least, partially needed to finance the construction of the project. I use the words "at least, partially," because there is also evidence that the end-finance was needed for service of the interest on the bridging loan. In dealing with the contentions of parties respecting the reasons for the failure of the Taman Mewah project (ie, owing to the failure to provide the end-finance as promised as contended by Kluang Wood, or because of poor planning and mismanagement of the project as advanced by Hong Leong), the learned trial judge found, which I see no reason to disagree, that failure of the project was not due to any poor planning and mismanagement thereof. In the circumstance, it is not open to Hong Leong to use the lack of architect's certificates as an excuse to shred liability for its own fundamental failure.

As regards the criticism that the representation rested on the **impression** derived by Chew from the negotiation with Pang rather than on Pang's actual utterances, I fail to see why an impression, if properly formed from negotiation with someone, cannot form the basis of a representation. See eg, *Box v. Midland Bank Ltd* [1979] 2 Llyod's Rep. 391 (discussed later). If there is any doubt, it is for the opposing party to test the propriety or correctness of the alleged impression. In the instant case, Chew was not at all cross-examined in this regard. On the other hand the subsequent letter dated 26 October 1983, approving, *inter alia,* the end-finance, contrary to being "at variance" as alleged, in fact materially substantiated Chew's impression respecting certainty of the financial arrangement. I see no merit in the complaint.

One point though ought, in my opinion, be clarified. In her judgment, the learned trial judge said to the effect that Pang had represented, *inter alia,* "that the availability of end-finance was a certainty." If, by this, it were taken to mean that Pang had actually uttered the word "certainty", then, with respect, a perusal of the notes of evidence does not show that Chew had used the word "certainty" in his testimony. However, this, in my opinion, does not render the conclusion of the learned trial judge untenable. On the evidence relating to the representations made by Pang to Chew, it is not an unfair or unreasonable conclusion that what Pang had represented to Chew gave the latter the impression on certainty of the availability of the end-finance.

For Hong Leong, it was contended that the learned trial judge did not find that Pang had been negligent in making the representations. Whilst it is true that the learned trial judge did not **expressly** hold that the representations were negligently made, it is obvious from the facts and the circumstances and from the manner she treated them that she was fully aware that a case of making statements negligently had to be made out. In point of law, proof of negligence involves proof of some duty owed by the defendant to the plaintiff, some breach of that duty and damage to the plaintiff which is causally connected with the breach of duty to take care.

In relation to statements made in pre-contractual negotiations, if a contracting party is under a duty of care in making such statements, a breach of that duty may lead to liability in tort for negligence. Thus in *Esso Petroleum Co. Ltd v. Mardon* [1976] 2 All ER 5 CA where the plaintiffs' servant holding himself out as having special expertise made a negligent representation in circumstances which gave rise to the duty to take reasonable care to see that the representation was correct, and the duty of care existed during the pre-contractual negotiations and survived the making of the written contract, the plaintiffs were held liable in tort of negligence. In our present case, the learned trial judge, finding that Hong Leong, through Pang, had represented to Kluang Wood that the availability of the end-finance was a certainty and that the first drawdown would be in the first quarter of 1984, and noting that no end-finance at all was provided, posed the question whether Pang had been negligent in making the representations, and alluded to the three elements necessary to establish the existence of a duty of care as propounded in Charlesworth & Percy on *Negligence* 8th Edn. p. 83 which read:

> The elements, which normally are essentials, in order to establish the existence of such a duty (i.e. duty of care), are:
>
> (a) it (the advice or information given) must concern a business or professional transaction, the nature of which makes clear the "gravity of the inquiry and the importance and influence attached to the answer"
>
> (b) the informant either realises or ought to have realised that he was being trusted as a matter of importance to give advice or express an opinion or disclose the best information known to him, since his statement was likely to be the basis upon which the recipient intended to act; and
>
> (c) in all the circumstances it was reasonable for the recipient to act on such advice, opinion or information. (brackets added)

The learned trial judge then found

(1) that the statements made concerned a business transaction;

(2) that Pang as the Chief Manager of Hong Leong, Southern Region, realised

that he was being entrusted to give all necessary information on which Kluang Wood could act, and

(3) that, in the circumstances of this case, it was "not unreasonable" that Chew had acted on the statements resulting, as events turned out, to the detriment of Kluang Wood. (see pp. 92 and 93 of the appeal record.)

From the above, it is implicitly clear that the learned trial judge found Pang negligent in making the statements.

An action for damages lies in respect of a misstatement which was negligently made thereby causing pecuniary loss to a person relying on such statement unless responsibility is expressly disclaimed in making the statement: *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] AC 465 HL. In that case, Lord Morris of Borth-y-Gest after considering the extent of liability that the making of negligent misstatement attached to such professionals as an accountant, a solicitor or a doctor, continued (p. 495):

> I can see no difference of principle in the case of a banker. If someone who was not a customer of a bank made a formal approach to the bank with a definite request that the bank would give him deliberate advice as to certain financial matters of a nature with which the bank ordinarily dealt the bank would be under no obligation to accede to the request: if, however, they undertook, though gratuitously, to give deliberate advice (I exclude what I might call casual and perfunctory conversations) they would be under a duty to exercise reasonable care in giving it. They would be liable if they were negligent although, there being no consideration, no enforceable contractual relationship was created.

Box v. Midland Bank Ltd [1979] 2 Llyod's Rep 391 which applied the *Hedley Byrne* principle (as the ratio in *Hedley Byrne v. Heller, supra,* is commonly known) contains certain salient features that bore comparable similarity to those in the instant appeal before us. There, the plaintiff, Mr. Box, a consultant engineer, asked the defendant bank to provide finance for a project of his company. The manager of the bank gave Mr. Box the impression that he (the manager) agreed, provided Mr. Box took out a policy issued by the Export Credit Guarantee Department (ECGD), in which case the consent of the bank's head office to provide the finance would be a mere formality. The bank manager, however, failed to explain the difference between a ECGD policy and a ECGD Banker's Guarantee (bills and notes) issued by the same department but gave the impression that both were equally easy to obtain. Mr. Box applied for the latter which he failed to get. Meanwhile the head office of the bank informed the bank manager that there was not the slightest possibility of the amount of the loan being santioned. The company ran into financial difficulty. Mr. Box brought an action against the bank for damages in negligence on the grounds that he had suffered loss by relying on the

careless statements made by the bank manager about the availability of finance. It was held that although the bank manager was not obliged to predict the outcome of an application for a loan, if he did so, he was under a duty to take reasonable care since he knew that his prediction would be relied upon. He had failed to exercise the reasonable care to be expected of a competent bank manager as he had given Mr. Box the impression that the granting of a loan would be a mere formality once the policy had been obtained. Applying the *Hedley Byrne* principle, the bank was therefore held liable. In his judgment, Lloyd J remarked (p. 398 right col.):

> The *Hedley Byrne* principle is not limited to negligent advice. It covers negligent statements generally including pre-contractual statements of the kind which grounded liability in *Esso Petroleum Co. Ltd v. Mardon* [1967] QB 801 CA.

The *Hedley Byrne* principle was applied in our courts in *Neogh Soo Oh & Ors v. G. Rethinasamy* [1984] 1 MLJ 126 and *Chin Sin Motor Works Sdn. Bhd. and Anor v. Arosa Development Sdn. Bhd. and Anor* [1992] 1 MLJ 23. In the latter case, the appeal to the Supreme Court was, as far as my research went, withdrawn.

On the facts and circumstances of the present case under appeal and applying the principles of law propounded in the authorities cited above, it is obvious to me that Pang had been negligent in making the statements upon which Kluang Wood had acted in making the loan application and to its detriment.

Next, the complaint was about the collateral warranties. In view of what I have said about the first drawdown of the end-finance, the collateral warranty now relates only to the statement by Pang to the effect that the availability of the end-finance was a certainty. For Hong Leong it was contended that Hong Leong could not possibly have given M$26 million end-financing because of the maximum amount imposed by Bank Negara and that to lend in excess of the maximum, approval of Bank Negara had to be sought. Reference was made to the evidence of DW1 Chuang Siow Hwee.

In reply, Mr. Manjit Singh for Kluang Wood submitted that the end-finance was not to be given to a single customer but to the purchasers ie, house-buyers so that the question of breaching the Bank Negara ruling did not arise.

With respect, I do not think the contention on behalf of Hong Leong is tenable. The pertinent question is whether Pang had represented to Chew to the effect that availability of the fund was a certainty. If he had, as found by the learned trial judge, it mattered not whether approval was needed and not obtained since this was not made known to Chew during the negotiation. It was also not

mentioned in the agreement-letter dated 26 October 1983 which stated that the end-finance would be syndicated. If sanction of the Bank Negara was indeed necessary, Hong Leong should have made it known to Kluang Wood at some material stage or conditioned its approval of the syndicated end-finance upon obtaining the approval of the Bank Negara.

On behalf of Hong Leong, admissibility in evidence of the collateral warranties based on Pang's pre-contractual statements aforesaid was called in question by reference to s. 92 of the Evidence Act 1950 the main provision of which reads:

> When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms:

With respect, the contention, in my opinion, is unsustainable. Proviso (b) to s. 92 reads:

> (b) the existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved, and in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document;

Thus if the additional evidence sought to be introduced falls within the scope of the proviso, it may be admitted in evidence. In considering whether the proviso applies, regard is to be had to the nature of the written agreement and, in my opinion, also its surrounding circumstances. The document in the instant case is in the form of a letter. Matter about certainty of the end-finance and Pang's utterances giving rise to impression of such certainty are not in the document, nor is certainty of the finance inconsistent with the terms therein. As regards the utterance about the timing of the first drawdown, I also do not think it inadmissible. The proviso applies. No time-frame about the first drawdown was given in the said letter. In *Tan Chong & Sons Motor Co. (Sdn.) Bhd. v. Alan McKnight* [1983] 1 MLJ 220 FC provisos (b) and (c) of s. 92 of the Evidence Act 1950 were considered and oral pre-contract representations were held admissible. See also *Tan Chong and Sons Motor Co. Ltd. v. Yang Chin Lang* [1967] 1 MLJ 123. English authorities also show that where on a sale or letting of houses, the written contract did not contain an

oral warranty previously given by the vendor-builder or the landlady's agent, the parol evidence was admitted. See *Otto v. Bolton* [1936] 2 KB 46 @ 50-51; *Miller v. Cannon Hill Estates Ltd.* [1931] 2 KB 113 @ 118; *Collins v. Hopkins* [1923] 2 KB 617 @ 629. The learned trial judge therefore was justified in admitting them in evidence.

As to the consequence of breach of the collateral warranty by Hong Leong, the learned trial judge was obviously of the view, which I have no reason to disagree, that the failure of the Taman Mewah project was due to unavailability of the end-finance.

(3) Res Judicata

As stated earlier, the learned trial judge dismissed the claims of both plaintiffs, holding that *res judicata* applied in that there was privity of interest between Kluang Wood and Chew. After alluding to the fact that Chew was a director of Kluang Wood and had "involved in the conduct of the affairs of" Kluang Wood as agent for Kluang Wood, the learned trial judge continued:

> the 1st plaintiff (i.e. Kluang Wood) must be presumed to be privy to all matters conducted by PW1 (i.e. Chew) on behalf of the 1st plaintiff including all matters giving rise to the cause of action in the earlier civil suit (i.e. Johore Bahru suit). As the 2nd plaintiff (Chew) was sued as a guarantor in the earlier civil suit in respect of the bridging loan that had been granted by the 1st defendant (Hong Leong) to the 1st plaintif, there is therefore ample evidence to show that there is a privity of interest between the 1st plaintiff in these proceedings before me and the 2nd plaintiff in the earlier civil suit and to that end, *res judicata* is applicable to put an end to any further proceedings between the same parties based on the same facts which had already been litigated before or could have been raised and litigated in the earlier civil suit. (Pages 107 and 108 of the Appeal Record).

Counsel for Kluang Wood and Chew submitted that no privity of interest existed, there being no common interest between the two. He pointed out that the Johor Bahru suit was on a guarantee executed by Chew. Kluang Wood was not a party to and had no interest in that suit. Kluang Wood, on the other hand, had independent causes of action against Hong Leong.

For Hong Leong, counsel submitted that there was privity of interest between Kluang Wood and Chew. In support, reference was made to the evidence of Chew in this action and his affidavit evidence in the Johor Bahru suit. Counsel pointed out that in Hong Leong's application for summary judgment in the Johor Bahru suit, the defendant-guarantors, including Chew, relied on the non-release of the end-finance as a defence to the said application.

It may now be convenient to consider what Hong Leong had pleaded in its amended defence on issue estoppel in this action, and what Chew had raised

in the Johore Bahru suit.

Paragraphs 24 to 27 of the amended defence read:

> 24. *The Defendants will aver that the issues raised by the Plaintiffs in paragraphs 6 to 14 of the Re-Amended Statement of Claim filed in this Suit have already been litigated by the 1st Plaintiff in this Suit (Kluang Wood) in Johor Bahru High Court Civil Suit No. 354 of 1985 ("the Johor Suit"). The Johor Suit was commenced by the 1st Defendant (Hong Leong) against inter alia the 2nd Plaintiff in this Suit (Chew) in respect of a Letter of Guarantee dated 29th day of October 1983 executed by inter alia the 2nd Plaintiff in this Suit (Chew) to secure the loan of $3,500,000/- made by the 1st Defendant (Hong Leong) to the Plaintiffs. The High Court at Johor Bahru entered judgment against the Defendants in Johor Suit (Chew and other guarantors) on the 5th day of March 1986 after hearing arguments from Counsel for inter alia, the 2nd Plaintiff, one Lim Chuen Ren.*
>
> 25. *The 2nd Plaintiff (Chew) had in the Johor Suit filed an Amended Defence and Affidavits setting out essentially the same Defence as all allegations raised by the Plaintiffs (Kluang Wood and Chew) in paragraphs 6 to 14 of this suit. These allegations are dealt with the 1st Defendant (Hong Leong) in its Affidavit in Reply in the Johor Suit. The 1st Defendant will refer to the said Affidavits, Amended Defence and Affidavit in Reply at the trial of this action for their full terms and effect.*
>
> 26. *The Defendants will also aver that the Plaintiffs in this Suit have stated in paragraph 1 of the Statement of Claim in this Suit that the 2nd Plaintiff (Chew) was at all material times a Director of the 1st Plaintiff (Kluang Wood). The 1st Plaintiff was in the circumstances well aware of all the facts at material times.*
>
> 27. *By reason of the premises the Plaintiffs are estopped from maintaining their claim against the 1st Defendant (Hong Leong).*

In para. 7 of their reply, Kluang Wood and Chew denied the allegations:

> 7. In reply to paragraphs 24, 25, 26 and 27 of the Amended Defence the Plaintiffs deny that they are in law or in fact estopped from prosecuting these proceedings or raising any of the issues herein.

By paras. 24 to 27 of the amended defence, Hong Leong alleged in effect that the questions of negligent misrepresentation and breach of collateral warranty had already been litigated in the Johor Bahru suit, and therefore Kluang Wood and Chew were estopped from raising them in this action. The two questions constitute the two causes of action in this suit. Hence such a plea is in fact a plea of *res judicata* by way of estoppel to the above two entire causes of actions (as opposed to a point in issue). It amounts to an allegation that the whole legal rights and obligations of Kluang Wood and

Chew had been concluded by earlier judgment in the Johor Bahru suit. In the face of such allegations by Hong Leong, the learned trial judge and this court would be entitled to look at the reasons for the decision and the notes of evidence of the trial judge in the Johore Bahru suit to determine whether the two questions constituting the causes of actions herein had been determined. See *Randolph v. Tuck* [1961] 1 All ER 814. Unfortunately the grounds or reasons for the decision in the Johore Bahru suit are not exhibited in this case. Hence it has not been established that the two questions or causes of action had been adjudicated upon, the burden of which lies on the party who alleges it ie, Hong Leong in this case.

As regards the affidavit evidence in opposition to Hong Leong's O. 14 application for summary judgment in the Johor Bahru suit in which Hong Leong sued Chew as guarantor of the bridging loan, paras. 8 to 13 of the affidavit of one Yap Teck Lock, a co-defendant, made on behalf of all the defendants including Chew read:

> 8. The purchasers have applied for and the majority of the purchasers have been granted loans. The loan documentation has also been done. However the Plaintiffs (Hong Leong) have failed and still fail to release the end-financing.
>
> 9. I aver that if the end-financing is released there would be sufficient to pay the amount due to the Plaintiffs.
>
> 10. I aver and contend that if the end-financing is released the sum so released will be paid directly to the Plaintiffs. Yet the Plaintiffs refused to release the end-financing to pay off itself.
>
> 11. I aver that the Plaintiff is estopped from claiming the sum allegedly owed by the Developers from the Defendants (Chew and other guarantors). I further aver and contend that it is inequitable for the Plaintiffs to claim against the Defendants.
>
> 12. The Defendants aver that prior to the signing to the alleged letter of guarantee dated 23rd December, 1983 the Plaintiffs and/or its agents or servants agreed that the Plaintiffs will release the loan granted to the individual purchasers and utilise the same to pay off the amount allegedly owed by the Developers.
>
> 13. In reliance and in pursuance to the Plaintiffs and/or its agents or servant's agreement and misrepresentation the Defendants were induced to sign the letter of guarantee.

By paras. 8 to 11 of the above affidavit, Chew was virtually contending that

Hong Leong was estopped or it was inequitable for Hong Leong to claim the guaranteed sum by reason of its failure to release to the purchasers the end-finance which would have been paid directly to Hong Leong. Thus the failure to release the end-finance on the part of Hong Leong, which was common ground in the present action, was merely used by Chew as a ground to found estoppel against the claim for the guaranteed sum. By paras. 12 and 13 of the said affidavit Chew alleged that he was induced to sign the guarantee by Hong Leong's agreement and misrepresentation that the end-finance to be granted to individual purchasers would be used to pay off the amount allegedly owed by Kluang Wood. It will be seen at once from the above paragraphs of the affidavit that the issues of **collateral warranty** and **breach** thereof, and **negligent misrepresentation** by Pang on behalf of Hong Leong (which constitute the causes of action in the instant case under appeal) were not even raised in the Johor Bahru suit, let alone having been adjudicated upon as averred in para. 24 of the amended defence. In *Carl Zeiss Stiftung v. Rayner & Keeler Ltd (No. 2)* [1967] 1 AC 853 H.L. Lord Reid said: (913)

> The second requirement for *res judicata* is identity of subject-matter. As to this it has become common to distinguish between cause of action and issue estoppel. There is certainly no cause of action estoppel here. The question before the German court was whether the Council for Gera were the legal representatives of the Stiftung at one date. The question here is whether at a different date the solicitors had the authority of the Stiftung to raise the action. An answer, Yes or No, to the first question does not necessarily imply a similar answer to the second.

On the same reasoning, there is, in my view, no identity of subject-matter and no cause-of-action estoppel in our present case. As stated earlier, it is common ground that the end-finance was never at all furnished by Hong Leong. The questions in the Johor Baru suit was whether the failure to provide the end-finance **estopped** Hong Leong **from claiming the guaranteed sum** from Chew, and whether there had been misrepresentation on the part of Hong Leong and/or its agents or servants **inducing Chew to sign the guarantee** dated 23 December 1983. In other words the issues were whether there was estoppel and whether the signing was induced by the alleged misrepresentation, if any. The questions in our present case are whether at an earlier date there had been **negligent misrepresentations** and whether the representations constituted a **collateral warranty** and **breach** thereof. The timing and facts forming the background of the questions raised in the two suits are different. The questions in our present case relate to matters that took place prior to matters relating to the issues raised in the Johor Bahru suit. Furthermore, answers, whether affirmative or negative, to the issues in the Johor Bahru suit do not necessarily mean similar answers to the causes of action in the present

case. As for the matters raised in the affidavit, since the reasons for the decision on the summary judgment are not available, it would not be possible to say with any degree of certainty what had actually been decided in granting the judgment, but from the fact that the summary judgment was entered against Chew, it is reasonably safe to conclude that his contentions of estoppel and inducement did not constitute any triable issue in respect of the claim under the guarantee.

As for Kluang Wood, obviously it could not have raised the issues constituting the causes of action in the instant case in the Johor Bahru suit, it being not a party to that action, which was an action on guarantee.

Another point of contention on *res judicata* is whether Kluang Wood and Chew were estopped from raising the second claim of fraudulent or improper exercise of power of auction sale on the ground that such claim could have been raised as a counterclaim in the charge action (Originating Summons No. 210/85 in Johor Bahru) commenced by Hong Leong against Kluang Wood. In this regard, the learned trial judge, relying on *Kandiah Peter v. Public Bank Bhd* [1994] 1 MLJ 119 SC, concluded (p. 106 of the appeal record):

> Thus based on the authority of *Kandiah v. Public Bank*, the defendants cannot rely on the plea of *res judicata* or issue estoppel either in its narrow or broader application as the answer to the plaintiffs' second claim in the proceedings before me. In any event, I have already decided that plaintiffs' second claim has not been substantiated.

The contention, in my view, is without merit. In any event it need not be dealt with. Firstly, the auction sales under which the fraudulent or improper exercise of the power of sale were alleged to have arisen took place **after** the making of the sale-order. Therefore, the allegations could not possibly be raised in the charge action. Secondly, the learned trial judge had held that the allegations constituting the second claim failed; and before us, the appeal relating to this second claim had been abandoned. The contention therefore has no merit and must fail.

Then there is the issue of whether Kluang Wood was a privy to Chew so as to be estopped from suing in this action? The relevant privity here is, of course, privity of interest (as opposed to privity of blood or title). In *House of Spring Gardens Ltd v. Waite & Ors* [1991] 1 QB 241 CA Stuart-Smith LJ observed (@ 252):

> It is not easy to detect from the authorities what amounts to a sufficient interest.

In that case, the plaintiffs obtained a monetary judgment in the Republic of Ireland against three defendants. Two of the defendants then brought another separate action in Ireland to set the judgment aside on ground of fraud but their action was dismissed. In subsequent enforcement proceedings in England,

the court gave judgment in favour of the plaintiffs. On appeal by the 3rd defendant who was not a party to the second action in Ireland, it was held that the second Irish judgment was final and conclusive on the issue as to whether or not the first judgment was obtained by fraud and therefore could not be impeached.

The third defendant was thereby estopped from alleging that the first judgment had been obtained by fraud because he was privy to the parties who were bound by the estoppel, having had knowledge of the second action which he had not chosen to join. In that case the third defendant was a party to the first action.

Gleeson v. J Wippell & Co. Ltd. [1977] 3 All ER 54 was a case on striking out action under O. 18 r. 19 of the Rules of the Supreme Court. Nevertheless it involved the questions of issue estoppel and the existence of privity of interest between present and former defendants. In that case, the plaintiff, a shirt designer, unsuccessfully brought an earlier action against some shirt manufacturers for breach of copyright, the allegation being that the shirt manufacturers had copied a shirt supplied to them by the defendants in the present action which had itself been copied from shirts which were copies of the plaintiff's drawing. Having lost in that earlier suit, the plaintiff commenced the instant action against the defendants who were also shirt manufacturers, alleging infringement of copyright in relation to the same shirt. The defendants sought to strike out the plaintiff's action on ground that as the central issue raised in the statement of claim ie, whether the defendants' shirts were indirect reproductions of the plaintiff's drawing, had already been determined in the previous action, it was frivolous, vexatious and otherwise an abuse of the process of the court for the plaintiff to relitigate what had already been decided against her. It was held that the defendants could not invoke the doctrine of issue estoppel against the plaintiff. The defendant had not been a party to the previous action and there was no ground for holding that they were in privity of interest with the defendants in that action or that they were linked in such a way as to make any doctrine of *res judicata* applicable. There was a trade relationship between them but that was all. The court refused to strike out the action. Megarry V-C in his judgment said: (p. 60)

> ... but it does seem to me that, having due regard to the subject-matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party. It is in that sense that I would regard the phrase 'privity of interest'.

He later continued:

> Suppose that in the *Denne* action (the earlier action) the plaintiff Miss Gleeson, had succeeded instead of failing. Would the decision in that action that Wippell

> (the defendant in the instant action) had indirectly copied the Gleeson drawings be binding on Wippell, so that, if sued by the plaintiff, Wippell would be estopped by the *Denne* decision from denying liability? Counsel for Wippell felt constrained to answer Yes to that question. ... In such a case, Wippell would be unable to deny liability to Miss Gleeson by reason of a decision reached in a case to which Wippell was not a party, and in which Wippell had no voice. Such a result would clearly be most unjust. Any contention which leads to the conclusion that a person is liable to be condemned unheard is plainly open to the gravest of suspicions. A defendant ought to be able to put his own defence in his own way, and to call his own evidence. He ought not to be concluded by the failure of the defence and evidence adduced by another defendant in other proceedings unless his standing in those other proceedings justifies the conclusion that a decision against the defendant in them ought fairly and truly to be said to be in substance a decision against him. Even if one leaves on one side collusive proceedings and friendly defendants, it would be wrong to enable a plaintiff to select the frailest of a number of possible defendants, and then to use the victory against him not merely in *terrorem* of other and more stalwart possible defendants, but as a decisive weapon against them.

It appears the authorities tend to indicate that whether there is sufficient connection to constitute privity of interest would depend on an examination of the factual identity of interests of the parties and the fairness of binding them by a decision in which they were not represented.

Therefore, so far as concerning Kluang Wood, for the reasons given above, including that it was not a party to the Johor Bahru suit, there is, in my opinion, no valid ground for holding that Kluang Wood was in privity of interest with Chew in the Johor Bahru suit or that they were so linked as to make the doctrine of *res judicata* applicable. Furthermore, the grounds for the decision in the Johor Bahru suit were not available in evidence in the present suit and accordingly unknown.

For all the above reasons, I am of the view that Kluang Wood is entitled to succeed in this action against Hong Leong.

Could Chew Sue?

In the case of Chew, the situation falls into a totally different category. It relates to his capacity to sue on the two causes of action in the present suit. In her judgment, the learned trial judge said that Chew should have brought up the two causes of action in the Johor Bahru suit. Could he? As a matter of law, an agent who has contracted for a disclosed and named principal cannot, as a rule, sue on the contract. *Fairlie v. Fenton* [1870] LR 5 Ex 169; *Evans v. Hooper* [1875] 1 QBD 45; *T.P. Jordeson & Co. and Kahn v. London*

Hardwood Co. Ltd. [1913] 110 LT 666. This is so even if he is the real principal unless the other party has affirmed the contract with knowledge of the fact. *Bickerton v. Burrell* [1816] 5 M & S 383; *Rayner v. Grote* [1846] 15 M & W 359. There are, of course, certain other exceptions but they are not applicable in our present case. In the instant case, it cannot be disputed that Chew, to the knowledge of Hong Leong, negotiated for Kluang Wood throughout. The right of action to which the collateral warranty gives rise is personal as between the two contracting parties concerned. As between them, breach of the warranty may form the basis of an action for damages, but it does not normally entitle a non-contracting party to sue thereon. Therefore Chew, in my opinion, cannot sue on the two causes of action.

Furthermore, assuming Chew had the right to sue thereon, his evidence departed from his pleading. Paragraph 23 of the re-re-amended statement of claim reads:

> 23. The 2nd Plaintiff (Chew), contends and will contend that but for the breach of the aforesaid duties owed by the 1st Defendant (Hong Leong) to him, his liability under the said guarantee and the judgment would have been extinguished by the proceeds obtained from the lawful sale of the said land. (Brackets added)

It is clear from the re-re-amended statement of claim that the phrase "the said guarantee" in para. 23 above referred to the guarantee executed by Chew in respect of the bridging loan of RM3.5 million, and that "the judgment" related to the summary judgment obtained in the Johor Bahru suit for the sum guaranteed. It is also obvious that the "aforesaid duties" owed by Hong Leong said to have been breached were the alleged "duty to act in good faith and honestly" and "to exercise reasonable care and skill" in relation to the power of sale of the said land. As stated earlier, this part of the case about fraudulent sale had been abandoned by Kluang Wood and Chew in this appeal. Be that as it may, from the point of view of the pleading, by the said para. 23, Chew pleaded, in effect, that had it not been for the breach of the duties to conduct the auction sale of the charged land by Hong Leong, his liability under the guarantee would have been settled from the sale proceeds. However, Chew's evidence, contrary to what he had pleaded, seems, though somewhat vaguely, to attribute the enforcement of the guarantee for the bridging loan against him to the failure of Hong Leong to furnish the end-finance as opposed to the alleged breach of duties relating to the auction sales as pleaded. This was what he said in his evidence:

> If the end financing had come and the 1st plaintiff had completed the project the profits as projected by 1st defendant was $12,592,400 ...
>
> There is a debt owing by me to the 1st defendant amounting to $3.7 million with interests. I ask this Court for damages and for damages I have to pay

> back the 1st defendant amounting to $3.7 million (p. 136 and 137 of the Appeal Record)
>
> One of the purposes of the end financing was to repay the interest due on the bridging loan. ...
>
> The end financing will assist to pay interests on the bridging loan and later on to redeem individual lots and also finance construction of the development. (Page 147 of the Appeal Record)
>
> In August 1983, when I negotiated with the 1st defendant, it was contemplated that the end financing would be ultilised to pay the interests due on the bridging loan. (Page 151 of the Appeal Record)

However he had also said:

> In C.S. 354/85, I am represented by lawyers but I do not know the defences they had put up for me. (Page 144 of the Appeal Record)

In any event, the fact that summary judgment for the bridging loan was entered against Chew in the Johor Bahru suit reasonably clearly indicated the rejection of Chew's attempt to raise some triable issues. And there was no appeal against that decision.

There remains claim (d) in the re-re-amended statement of claim where Chew sought for a declaration that Hong Leong was not entitled to execute upon the judgment obtained by Hong Leong against Chew in the Johor Bahru suit. On the facts and the circumstances in this case under appeal including that the claim on impropriety of the auction sale having been abandoned, and what I have said immediately above in relation to para. 23 of the re-re-amended statement of claim, I find no merit in the claim, which is hereby dismissed.

For the above reasons, the claim of Chew in this action must, in my opinion, fail.

Conclusions

In short, my conclusions are:

The learned trial judge was justified in holding that there had been negligent misrepresentation about certainty of the end-finance and breach of collateral warranty; and, contrary to the learned trial judge's finding, there is no *res judicata* or action estoppel. Kluang Wood was entitled to maintain this action, and the appeal by Kluang Wood be allowed. The order of the learned trial judge dated 18 April 1994 to the extent of dismissing Kluang Wood's claims be set aside. There be an order for damages to be assessed; as regards Chew, his action stands dismissed for the different reasons given above; and the cross-

appeal by Hong Leong (to the extent relating to Kluang Wood) be dismissed.

As to costs, since Kluang Wood abandoned its appeal respecting the auction sale of the charged land but otherwise succeeds in this appeal while the estate of Chew (deceased) represented by his wife and son fails, and Hong Leong is unsuccessful in its cross-appeal against Kluang Wood, I would exercise the discretion and order that (unless otherwise agreed by parties) the costs of the court below (if not taxed yet) and the costs of this appeal be taxed, that ½ of such taxed costs be paid by Hong Leong to Kluang Wood, and 1/3 of such taxed costs be paid by Kluang Wood to Pelita Terang Sdn. Bhd; and that the costs of Hong Leong's cross-appeal be also taxed and paid by Hong Leong to Kluang Wood. There be no order as to costs respecting Chew.

Mohd Dzaiddin FCJ:

Both the appeal and cross-appeal arose out of the default of the 1st appellant, the 1st plaintiffs in the court below, to repay the bridging loan of RM3,673,051.50 owed to the 1st respondent, which was secured by the first fixed legal charge over the 1st appellant's land and the guarantee given by the directors, one of whom was the 2nd appellant. For convenience and brevity, I shall refer the parties herein as plaintiffs and defendants respectively.

Factual Background

The 1st plaintiffs are licensed housing developers and registered proprietor of a piece of land held under Johor Grant No. 2365, Lot 506, Mukim of Kluang, Daerah Kluang, Johor (the said land). In early 1983, they negotiated with the 1st defendant, a public limited company carrying on the business of a licensed finance company under the Finance Companies Act 1969, for banking facilities to enable them to develop the said land into a housing estate to be known as Taman Mewah. On 24 August 1983, a formal application (AB15-16) was made seeking for RM4.5 million for bridging loan and RM21 million as end-finance. On 26 October 1983, the 1st defendant approved the application, *vide* the letter of approval, AB17-22, (hereinafter called the agreement) which, *inter alia,* states:

> 26 October, 1983
>
> M/s Kluang Wood Products Sdn. Bhd.
> 4th Floor, SPPL Building
> 315, Alexandra Road,
> Singapore 0315
>
> Dear Sirs
>
> **Re: Bridging Loan Of M$3.5 Million And End-Finance Of M$26 Million**

a We refer to your loan application and are pleased to confirm that our Management Committee has approved your Bridging Loan of M$3.5 million and End-Finance of M$26 million subject to the following terms and conditions:

(1) **For Bridging Loan**

b Loan Amount : M$ 3.5 million

Duration : 24 months from the date of first drawdown

Security : The Bridging Loan shall be secured by:

c a) A first fixed charge under the National Land Code on the 32.325 acres of land to be developed and known as Johore Grant No. 2365 Lot No. 1466, District of Johor Bahru. When individual titles are available, the Bridging loan shall be secured by first fixed charge over the 498 titles.

d b) Joint and several guarantee of all the following persons:

i) Ong Tiong Soon

ii) Chew Beng Gim

e iii) Leonard Cheng Tye Loke

iv) Peter Gan Siew Chong

v) Yap Teck Lock

f vi) Yap Teck Huat

c) Full and unconditional guarantee of Feng Yuan Holding Pte. Ltd.

Interest Rate : The prescribed rate of interest payable on this loan shall *g* be 14.5 p.a. on monthly reducing basis.

...

Repayment : Payments of monthly interest on the amount drawdown shall begin one month after the loan amount is released in part or in full to you or on your behalf.

h

The Bridging Loan shall be fully repaid by redemption payments at the following rates:

...

i ... ...

... ...

a) ...

b) ...

i) ...

ii) ...

iii) ...

iv) ...

v) ...

c) ...

d) ...

e) ...

f) ...

g) ...

... ...

... ...

... ...

(II) For End-Finance

Manager	: Hong Leong Finance Berhad will be the manager for the syndication of End-Financing facilities of M$26 million to Kluang Wood Products Sdn. Bhd. to finance the individual purchasers of Taman Putri. In addition, HLFB will also participate in the syndicated loan.
Amount of Facility	Total End-Financing facilities to be syndicated by HLFB is M$26 million. HLFB will provide facilities of up to M$5.0 MILLION.
Purpose of facility	To finance the individual purchaser of the residential and shophouses in Taman Putri.
...	...
...	...
Management	0.5% of total loan amount syndicated (i.e. 0.5% of

Fee:		M$26M = $130,000) payable to HLFB upon execution of Master Agreement.
...		...
...		...
Drawdown	:	Loan to individual purchaser will be drawdown in proportion to the work in progress as certified by the Project's Architect. Before the drawdown of each loan, the developer has to confirm that the purchaser has paid the difference between the selling price and the loan amount. The final disbursement shall only be made upon issue of the Certificate of Fitness from the relevant authority.
...		...
Security	:	a) Loan agreement between purchaser and end-financier. b) Assignment of the Sale & Purchase Agreement between purchaser and developer to HLFB. c) A first legal charge under the National Land Code over the respective lot upon issue of individual qualified title.

Yours faithfully,
for Hong Leong Finance Berhad
Johor Bahru Branch

Sgd
Chuan Siow Hwee
Branch Manager

I/We confirm acceptance of the above

Sgd
for & on behalf of Kluang Wood Products Sdn Bhd.

On 29 October 1983, the 1st plaintiffs created the first legal charge of the said land in favour of the 1st defendant. Likewise, the 2nd plaintiff together with the other directors of the 1st plaintiffs executed the letter of guarantee, AB23-30. It is to be noted that the charge and guarantee were given as securities for the bridging loan. Upon registration of the charge, the first payment of RM200,000 of the bridging loan was disbursed to the 1st plaintiffs on 31 October 1983.

Consequently, in January 1984, based on information and particulars supplied by the 1st plaintiffs, the 1st defendant prepared a placement memorandum, for syndication of end-finance of RM26 million. The object of this placement memorandum was to enable the 1st defendant to invite other interested financial institutions to participate in the syndication of the end finance. It is of significance to note that under the agreement the 1st defendant were mandated to be the lead manager for the syndication and had committed to provide RM5.0 million toward the end-financing. Three financial institutions, namely, Public Finance Berhad, Malaysia Credit Finance Berhad and Malayan Banking Berhad responded to the 1st defendant's invitation to participate. It seemed that Public Finance Bhd. was willing to commit RM3 million provided the 1st defendant surrendered the issue document of title of the lots held by the latter as security, an undertaking that they relinquish all their rights and interests over the said lots in favour of Public Finance Bhd. and that these lots be excluded for auction in the event of foreclosure proceedings by the 1st defendant. However, since the 1st defendant failed to give the above undertaking, Public Finance Bhd. cancelled their offer to participate in the syndication of the end-finance on 14 March 1986. In the end, there was left only the 1st defendant's commitment of RM5.0 million, where security was given in the form of a letter of guarantee dated 16 November 1984, AB216-228 executed by the directors of the 1st plaintiffs, 2nd plaintiff and Feng Yuen Holdings Pte. Ltd.

It is common ground that the 1st defendant had fully disbursed the bridging loan of RM3.5 million to the 1st plaintiff. By December 1984, the 1st plaintiffs were in dire financial straits because the syndicated end-finance which was part of the agreement was still not available despite the execution of the second guarantee, AB216-228. The 1st plaintiffs also contended that in compliance with the agreement, they had submitted to the 1st defendant 116 applications for housing loan by their purchasers.

Finally and most significantly, as at 31 January 1985, the 1st plaintiffs were owing the 1st defendant RM3,673,051.50 on the bridging loan. Upon failure to repay the aforesaid loan, the 1st defendant took the following legal action. First, on 8 May 1985 they issued a writ against the guarantors of the 1st plaintiffs (including the 2nd plaintiff) in Johor Bahru High Court C.S. No: 354 of 1985 seeking to enforce the guarantee, AB23-30. On 5 March 1986, a final judgment under O. 14 RHC was obtained against the 2nd plaintiff and other guarantors for the aforesaid sum of RM3,673,051.50.

Secondly, on 16 May 1985 the 1st defendant filed an application for Order for Sale under s. 256 of the National Land Code 1965 (the Code) against the 1st plaintiffs in Johor Bahru High Court O.S No. 210/1985. As the 1st

plaintiffs did not enter an appearance, on 17 July 1985, the court granted the Order for Sale of the said land. An auction sale was first fixed for 10 November 1985, but this was never proceeded with as the valuation of the said land was only completed on 23 December 1985. Three subsequent auctions were carried out without success. Finally, at the fifth auction on 25 January 1987, the said land was sold to the 1st defendant's marketing manager, DW1, who bid on behalf of the 2nd defendant a wholly owned subsidiary of the 1st defendant for RM3.2 million.

Thus, it is against the above factual background that the plaintiffs had commenced this action against the 1st and 2nd defendants in the court below.

Pleadings

The plaintiffs' claim against the defendants is for damages for negligent misrepresentation and/or breach of collateral warranty. The re-re-amended statement of claim averred that by the agreement, the 1st defendant expressly or by necessary implication represented to the 1st plaintiffs that a bridging loan of RM3.5 million had been approved and that a syndicated end-financing facility of RM26 million to be managed by the 1st defendant would be made available for the benefit of the purchasers by the first quarter of 1984. The plaintiffs further averred that at the time of making the aforesaid representation the 1st defendant intended and it well knew or ought to have known that the 1st plaintiffs would rely on the said representation and be induced to act upon it, in particular, the 1st defendant had knowledge or means of knowledge that the housing project on the said land could not be completed without the end-finance of RM26 million being made available. It was further contended that the 1st plaintiffs to the knowledge of the 1st defendant had a legitimate or reasonable expectation that such end-finance would be made available in order to successfully complete the housing project. Consequently, the 1st defendant failed to make available the promised end-finance facility of RM26 million, which resulted in their loss.

The plaintiffs contended that the 1st defendant was under a duty to take reasonable care in the making of the said representation and alleged that the 1st defendant had made the said representation negligently and thereby acted in breach of their duty. Paragraph 12 contained particulars of negligence.

On the collateral warranty, the plaintiffs pleaded in para. 13 to the effect that the representation thereof constituted a collateral warranty by the 1st defendant that it would provide end-finance of RM26 million to the 1st plaintiff. The 1st defendant acted in breach of the terms of the said collateral warranty.

The Defence

The defendants in their amended defence, denied the plaintiffs' allegations that they were guilty of negligent misrepresentation, and/or breach of collateral warranty in respect of the end-financing. They averred that they owed no duty of care to the plaintiffs on the alleged representation, and further denied that the said representation, if any, was negligently made. By way of further defence, the defendants contended that the plaintiffs were estopped from litigating the principal cause of action in the suit on the ground of *res judicata,* which are pleaded in paras. 24 to 27 of the amended defence. In essence, the defendants alleged that the issues raised by the plaintiffs in paras. 6 to 14 of the re-re-amended statement of claim have already been litigated by the 1st plaintiff in Johor Bahru High Court Civil Suit No: 354 of 1985. The Johor Bahru suit was commenced by the 1st defendant against, *inter alia,* the 2nd plaintiff in this suit in respect of a letter of guarantee dated October 1983 executed by, *inter alia,* the 2nd plaintiff in this suit to secure the loan of RM3.5 million made by the 1st defendant to the plaintiffs. The High Court Johor Bahru entered judgment against the defendants on March 1986 after hearing arguments from counsel.

The 2nd plaintiff had in the Johor Bahru suit filed an amended defence and affidavits setting out essentially the same defence as all allegations raised by the plaintiffs in paras. 6 to 14 of this suit. These allegations are dealt with by the 1st defendant in their affidavit in reply in the Johor Bahru suit.

The defendants also averred that the plaintiffs have stated in para. 1 of the re-re-amended statement of claim that the 2nd plaintiff was at all material times a director of the 1st plaintiffs. The 1st plaintiffs were in the circumstances well aware of all the facts at material times.

By reasons thereof, the plaintiffs were estopped from maintaining their claim against the 1st defendants.

Judgment

After hearing the evidence and considering the written submissions of counsel, on 18 April 1994 Siti Norma J (as she then was) made two basic findings:

(1) That the plaintiffs have succeeded on their principal claim against the 1st defendant for negligent misrepresentation with respect to the end-finance of RM26 million and the representations made on behalf of the 1st defendant regarding its availability constituted a collateral warranty which had been a breach when no part of the money was made available to the 1st plaintiffs.

(2) That the doctrine of *res judicata* or issue estoppel in the broader sense applies to the proceedings before her. To that end, the plaintiffs' principal claim and the alternative cause of action cannot be relitigated.

The Appeal

The appeal is against the finding of the learned trial judge that the plaintiffs' principal cause of action on the tort of negligent misrepresentation and alternatively for breach of collateral warranty could not be litigated again in the proceedings before her on the ground of *res judicata* or issue estoppel in its broader sense. In her grounds of decision (AR Vol. I Bahagian A & B p. 102), her Ladyship gave the following reasons:

> This plea (of *res judicata* or issue estoppel in its broader application) stems from separate proceedings commenced by the 1st defendant against the plaintiffs prior to the filing of this suit. In Johor Bahru Originating Summons No. 210/85, the 1st defendant as chargees of the property commenced foreclosure proceedings against the 1st plaintiff to recover the outstanding amount due on the bridging loan and on 17th July, 1985, obtained an Order of Court to sell the property by way of public auction. The 1st plaintiff did not contest the proceedings and neither the 2nd defendant nor the 2nd plaintiff were cited as parties.
>
> The filing of the foreclosure proceedings was followed on 8th May, 1985, by the 1st defendant filing Johor Bahru Civil Suit No. 354/85, seeking to enforce the guarentee dated 29th October, 1983, executed by the 2nd plaintiff and the other Directors of the 1st plaintiff. This guarantee and the charge executed by the 1st plaintiff were the securities provided by the plaintiffs for the bridging loan. Following a contested Order 14 proceedings, the 1st defendant obtained final judgment against the 2nd plaintiff for the sum of RM3,673,051.50 together with interest and costs on 5th March, 1986. Neither the 2nd defendant nor the 1st plaintiff were parties to this earlier civil suit.
>
> It is the defendants' contention that since all the issues raised in the proceedings before me have been pleaded as defences and argued extensively by the 2nd plaintiff in the Order 14 proceedings in the earlier civil suit, firstly before the Senior Assistant Registrar and secondly before the Judge in Chambers on appeal, and both had found the issues to be unconvincing, there had already been a final decision on those issues for which the plaintiffs are estopped from raising them again in these proceedings before me. The defendants also rely on the broader application of *res judicata* that the issues now raised by the plaintiffs to support their causes of action on negligent misrepresentation and breach of a collateral warranty could and should have been raised and litigated upon in the earlier civil suit.
>
> On the same token, the defendants maintain that the same issues could and

should have been raised in the foreclosure proceedings before the Johor Bahru High Court.

Her Ladyship continued (*ibid.* p. 106):

> The plea of *res judicata* is founded on the basis that since a decision has been made in any case or matter, there should be a finality in that decision and the parties affected by the decision or their privies are estopped from litigating the same cause or matter in subsequent proceedings before the same or another forum.
>
> It is now settled law that for the plea to succeed, the following requirements must be present.
>
> (1) The same issues must have been decided in both proceedings.
>
> (2) The judicial decision said to create the estoppel was final.
>
> (3) The parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised.
>
> It is only in respect of requirement (3) that the plaintiffs question the applicability of *res judicata* on the ground that there is no unity of parties or interest as the 1st plaintiff were not cited as a party in the earlier civil suit.
>
> That is very true but it must be remembered that as a Director of the 1st plaintiff and the person actually involved in the conduct of the affairs of the 1st plaintiff, PW1 is an agent of the 1st plaintiff and as the principal, the 1st plaintiff must be presumed to be privy to all matters conducted by PW1 on behalf of the 1st plaintiff including all matters giving rise to the cause of action in the earlier civil suit. As the 2nd plaintiff was sued as a guarantor in the earlier civil suit in respect of the bridging loan that had been granted by the 1st defendant to the 1st plaintiff, there is therefore ample evidence to show that there is a privity of interest between the 1st plaintiff in these proceedings before me and the 2nd plaintiff in the earlier civil suit and to that end, *res judicata* is applicable to put an end to any further proceedings between the same parties based on the same facts which had already been litigated before or could have been raised and litigated in the earlier civil suit. To that end, the plaintiff's principal cause of action on the tort of negligent misrepresentation and the alternative cause of action for breach of a collateral warranty cannot be litigated again in this Court and on that finding I dismiss
>
> (1) the plaintiffs' principal and alternative claims on the ground of *res judicata* or issue estoppel in its broader sense.
>
> (2) the second claim on the ground that it has not been substantiated.

Counsel's Submission

Encik Manjit, for the plaintiffs, submitted that the learned trial judge erred in

holding that the plaintiffs' action was barred by *res judicata* or issue estoppel in its broader sense. Counsel submitted that firstly, her Ladyship ought to have recognised that neither the 1st plaintiffs nor the 2nd defendant was a party to the Johor Bahru suit, which was a suit brought by the 1st defendant against guarantors. Such being the case, the 1st plaintiffs could not possibly have raised the cause of action of negligent misrepresentation and breach of collateral warranty as a defence or counterclaim in the Johor Bahru suit. No doubt, the 1st plaintiffs could have raised these issues in their affidavit to show "cause to the contrary" against the 1st defendant's application for order for sale in Johor Bahru O.S. No. 210 of 1985. However, since foreclosure proceedings do not result in a final judgment (*Peter Kandiah v. Public Bank Bhd* [1994] 1 MLJ 119), *res judicata* did not apply to the 1st plaintiffs here. The plaintiffs should not therefore be estopped from raising the issues which they could have raised in the foreclosure proceedings in the present action. Further, the Johor Bahru suit was concerned with the recovery of the amount owed under the bridging loan for which the 2nd plaintiff in this suit was one of the guarantors, whereas the present action was a tortious action of negligent misrepresentation made with respect to end-financing. There were thus two distinct actions. Since the 1st plaintiffs could not have raised the present cause of action as a counterclaim in the Johor Bahru suit, they were therefore not precluded from bringing the present claim as a separate action.

Pausing here, lest it be forgotten, the 2nd plaintiff was named as one of the defendants in the Johor Bahru suit.

Secondly, it was submitted that the learned judge was wrong in holding that the 1st plaintiffs were privy to the defendants in the Johor Bahru suit. The learned judge ought to have concluded that there was no common interest between the 1st plaintiffs in the present action and the guarantors, who were the defendants in the Johor Bahru suit.

The Law

In this appeal we are concerned with the doctrine of *res judicata* which has been extended to what is now described as issue estoppel in its wider sense. In *Carl Zeiss Stiftung v. Rayner and Keeler Ltd. (No. 2)* [1967] 1 AC 853 at pp. 933-934 Lord Guest explained what is issue estoppel:

> As originally categorised, *res judicata* was known as "estoppel by record." But as it is now quite immaterial whether the judicial decision is pronounced by a tribunal which is required to keep a written record of its decision, this nomenclature has disappeared and it may be convenient to describe *res judicata* in its true and original form as "cause of action estoppel." This has long been recognised as operating as a complete bar if the necessary conditions are present. Within recent years the principle has developed so as to extend to what is now described as "issue estoppel" that is to say, where in a judicial decision between the same parties some issue which was in controversy between the

> parties and was incidental to the main decision has been decided, then that may create an estoppel *per rem judicatam*.

In the above case, Lord Guest at p. 935 classified three basic requirements of issue estoppel. They are:

(i) that the same question has been decided;

(ii) that the judicial decision said to create the estoppel was final; and

(iii) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

The word "final" in requirement (ii), is understood to mean "final and conclusive on the merits" of the cause and the decision upon which the issue estoppel arises must itself be final in this sense. "It puts an end to and absolutely concludes that particular action." (per Lord Herschell in *Nouvion v. Freeman* (15 App. Cas. 1, 9.).

For requirement (iii), the judgment should have been between the same parties or their privies. According to Lord Guest, before a person can be a privy to a party there must be community or privity of interest between them. His Lordship added that it was essential that he who is later to be held estopped must have had some kind of interest in the previous litigation or its subject matter. Spencer-Bower and Turner on *Res Judicata*, 2nd Edn. p. 209 states that estoppel *per rem judicatam* operates for, or against, not only the parties, but also those who are privy to them in blood, title, or interest. See also *Halsbury's Laws of England*, 4th Edn. Vol. 16 p. 874 paras. 990-991.

Megarry V.C. in (*Gleeson v. J. Wippell & Co. Ltd* [1977] 1 WLR 510 at p. 515 laid the test for privity of interest in the following words:

> I do not say that one must be the alter ego of the other; but it does seem to me that, having regard to the subject matter of the dispute there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party. It is in that sense that I would regard the phrase "privity of interest".

The above test was applied by the English Court of Appeal in *House of Spring Gardens Ltd v. Waite* [1991] 1 QB 241).

In light of the above pronouncement, have the 1st plaintiffs a privity of interest in the Johor Bahru suit? In my judgment, they certainly have. The 1st plaintiffs

are unquestionably not a party to the Johor Bahru suit, whereas the 2nd plaintiff is a party in both proceedings. The real question is the interest which the 1st plaintiffs have in the subject matter of the Johor Bahru suit. The 1st plaintiffs were the principal debtors under the bridging loan. The 2nd plaintiff was a director of the 1st plaintiffs as well as one of the guarantors of the bridging loan upon which he was sued in the Johor Bahru High Court. Clearly, the 1st plaintiffs must not only be well aware of the proceedings, but also have special interest in the outcome of the said proceedings. Hence, there is a privity of interest between the 1st and 2nd plaintiffs in the Johor Bahru suit.

Turning to issue estoppel in its wider sense, the *locus classicus* is *Henderson v. Henderson* [1843] 3 Hare 100, 115, where Wigram V.C. states:

> ... where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

The Vice-Chancellor's phrase "every point which properly belonged to the subject of litigation" was expanded in *Greenhalgh v. Mallard* [1947] 2 All ER 255, 257, by Somervell LJ:

> ... *res judicata* for this purpose is not confined to the issues which the court is actually asked to decide, but ... it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

Wigram VC's pronouncement has been cited and followed in several subsequent decisions of the highest authority, one of which was the Privy Council decision in *Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd.* [1975] AC 581, an appeal from the Supreme Court of Hong Kong. Reaffirming the classic statement of Wigram VC in *Henderson v. Henderson, supra,* the Board reiterated the principle in the following words (p. 590):

> But there was a wider sense in which the doctrine might be appealed to, so that it became an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings.

In *Brisbane City Council v. Attorney General for Queensland (PC)* [1978] 3

WLR 299, the board stressed that the above was the true basis of the doctrine and stressed that it ought only to be applied when the facts are such as to amount to an abuse; otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation.

For Malaysian authorities, see *Asia Commercial Finance (M) Bhd. v. Kawal Teliti Sdn. Bhd.* [1995] 3 MLJ 189; *Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn. Bhd. & Ors.* [1988] 3 MLJ 90.

In the present appeal, the question is whether the issues raised in the plaintiffs' statement of claim in the present proceedings are matters which could and should have been litigated in the earlier Johor Bahru suit. Let us now examine the pleadings.

Clearly, paras. 6 to 14 of the plaintiffs' re-re-amended statement of claim contain allegations of fact to support a tortious action of negligent misrepresentation and/or breach of collateral warranty on the part of the 1st defendant. Except for the elaborateness of the pleadings, which contain particulars of alleged negligence, in my view, the issues pleaded in these paragraphs are, in substance, the same as the matters raised by the 2nd plaintiff and his co-defendants in their affidavits in the Johor Bahru suit. In their affidavits in reply against the 1st defendant's application for summary judgment under O. 14 RHC 1980, both the 1st and 5th defendants affirmed similar affidavits on behalf of themselves and the co-defendants, who included the 2nd plaintiff here, deposing as follows: (1) That sometime in September 1983, the 1st plaintiff as developers applied to the 1st defendant for bridging finance and end-financing for housing development. (2) That the said bridging loan of RM3.5 million was to be paid out from the end-financing of RM26 million. (3) That the 1st plaintiff have sold some houses to the purchasers who had applied for housing loan. (4) That if the end-financing was released that would be sufficient to pay the amount due and owing by them to the 1st defendant. In the circumstances, the 1st defendant should be estopped from claiming the sum owed by the 1st plaintiff from them as guarantors. (5) Lastly, that the 1st defendant and/or their servants or agents had misrepresented to them about the end-financing which the 1st defendant had agreed to release the loan granted to the purchasers to the 1st plaintiffs and which would be utilised to repay the bridging loan owed by the 1st plaintiffs to the 1st defendant. Hence, upon this representation, it was contended that the defendants in the Johor Bahru suit executed the second letter of guarantee, AB216-228. The Johor Bahru High Court however found no triable defence had been raised and granted summary judgment against the defendants, for which no appeal had been filed against the said judgment.

In light of what I have stated above, I find the issues in the present

proceedings had actually been raised, though in an oblique way, by the 2nd plaintiff and his co-defendants in their affidavits in reply to the 1st defendant's O. 14 application in the Johor Bahru suit. With the benefit of hindsight, I see no difficulty for the defendants, especially the 2nd plaintiff to instruct their solicitors to raise the issue of negligent misrepresentation in the defence or plead as a counterclaim in the Johor Bahru suit. The 2nd plaintiff, as a director of the 1st plaintiffs and one of the defendants in the Johor Bahru suit, was personally involved in the negotiations for the banking facilities on behalf of the 1st plaintiffs. Hence, there was no excuse for him not to give proper and adequate instructions to the solicitors regarding the alleged representations made by Mr. Pang Wee Pat about the end-financing. After all, these facts were available at the time of the Johor Bahru suit. No compelling reason has been advanced to show that the issue could not have been pleaded in the Johor Bahru suit except to contend that since the 1st plaintiffs were not a party to the Johor Bahru suit, they were not estopped from bringing a separate action against the defendants for negligent misrepresentation etc.

Based on the authorities I have referred to above, in my judgment, this is a clear case where the subject matter of the plaintiffs' claim in the present proceedings could and should have been pleaded in the defence in the Johor Bahru suit or raised as a triable issue under O. 14 application to the Johor Bahru suit. In the circumstances it would be an abuse of the process of the court to allow the 1st plaintiffs to bring a new proceeding in respect of the same issue which should have been litigated in the earlier Johor Bahru proceedings (*Yat Tung Investment, supra*, p. 590).

For the above reasons, I agree with the conclusion of the learned judge and the appeal should be dismissed.

Cross-appeal

The cross-appeal by the 1st defendant is against the finding of the learned judge that the plaintiffs have succeeded on their principal claim for negligent misrepresentation and the alternative claim for breach of collateral warranty in respect of the end-finance of RM26 million.

Negligent Misrepresentation

It will be noted that the plaintiffs' claim of negligent misrepresentation was premised on an alleged oral promise of the 1st defendant's servant or agent to procure the syndication of RM26 million as end-finance with the first drawdown to be made in the first quarter of 1984. In this regard, her Ladyship seemed to have relied on the oral testimony of the 2nd plaintiff, PW1 (now deceased) in the court below. PW1 stated that he had several negotiations with one Mr. Pang Wee Pat, the 1st defendant's southern regional manager, regarding the banking facilities to finance the 1st plaintiffs' housing project

prior to the acceptance of the facilities under the agreement. In the course of their negotiations, it seemed Pang made certain statements which led PW1 to believe that the syndication of the end-finance would pose no problem and that the 1st defendant could secure it for the 1st plaintiffs.

Based on PW1's evidence, the learned judge found as follows (pp. 77-78):

> PW1's oral testimony is that during the negotiations, Pang made 2 specific representations
>
> (1) that the 1st defendant would have no difficulty in procuring the syndicated end finance and that its availability was a certainty.
>
> (2) that the first drawdown of the end finance would come during the first quarter of 1984,
>
> and these representations assured and convinced PW1 that the project would be successfully completed with such end finance. It was following these negotiations that AB15 was tendered and approved by the 1st defendant with the granting of a bridging loan of RM3.5 million and a syndicated loan of RM26 million through their letter AB17-22. It is this letter which the plaintiffs rely to support their contention that the 1st defendant had expressly or by necessary implication represented to the 1st plaintiff that a syndicated end finance of RM26 million would be made available to the purchasers of Taman Mewah.

She then concluded (p. 82):

> It was these assurances that led PW1 to believe that the end finance was a certainty as the 1st defendant would not encounter any difficulty in getting the necessary participation from interested financial institutions and assured of the fact that end-finance was in place, the 1st plaintiff started constructing the 325 units of Phase 1 in January 1984 expecting them to be completed by the end of 1985.

Having found that Pang had given the assurance regarding the certainty of securing the end-finance, her Ladyship next posed this question:

> Was Pang negligent in making the representations as the essence of the tort of misrepresentation is the negligent manner in which the statements were made. (p. 91).

Citing a passage from Charlesworth & Percy on *Negligence*, 8th Edn. p. 83, she concluded that in the circumstances of the case she had no reason to doubt Pang's statement and held the 1st defendant liable.

The finding of the learned judge on negligent misrepresentation stemmed from the failure of the 1st defendant to secure for the 1st plaintiffs the syndication of the end-finance of RM26 million. Based on PW1's evidence and the

agreement containing terms for the end-finance, her Ladyship concluded that the 1st defendant did expressly or by necessary implication represent to the 1st plaintiffs that a syndicated end-finance of RM26 million would be made available to the 1st plaintiffs' purchasers.

Before this court, Encik Cecil Abraham submitted that the learned judge erred in law when interpreting the agreement by placing the 1st defendant under an obligation to secure the syndication of the end-finance. The question of end-finance should be considered purely on contractual standpoint. Counsel argued that under the terms of the agreement, the 1st defendant as lead manager was only obliged to try and secure the end-finance facility by getting other financial institutions to participate in the syndication. The 1st defendant was not contractually obliged to procure the end-financing except their commitment to provide RM5.0 million toward the said loan. Moreover, the syndication of the loan was conditional upon the 1st plaintiffs' compliance with the terms and conditions of the agreement which the 1st plaintiffs had failed to comply. Counsel submitted except for the 1st defendant's obligation to provide RM5.0 million which was readily available where a guarantee agreement dated 16 November 1984 was executed by the 1st plaintiffs' directors, the syndication exercise did not materialise because the 1st plaintiffs could not fulfil some of the conditions of the agreement. This was compounded when the said housing project came to a halt in January 1985 due to the buyers losing interest in purchasing the houses. For the above reasons, counsel submitted that the 1st defendant was not to blame for not securing the end-finance of RM26 million for the 1st plaintiffs.

The critical question here is whether the 1st defendant is legally obliged to secure the syndication of the end-finance facility of RM26 million. It is of importance to note that the agreement, AB17-22, stated that the management committee of the 1st defendant had approved the bridging loan of RM3.5 million and end-finance of RM26 million subject to the terms and conditions provided therein. Thus, the opening paragraph states:

> We refer to your loan application and are pleased to confirm that our Management Committee has approved your Bridging Loan of RM3.5 million and End-Finance of M$26 million subject to the following terms and conditions:

Therefore, since the granting of both loan facilities is subject to compliance of the terms and conditions stipulated therein, it is trite that one has to look at Part (II) of the agreement to see what are the terms for the granting and releasing of the end-finance of RM26 million. Clearly under **"For End-Finance"**, it is stipulated that the 1st defendant will be the manager for the syndication of end-financing facility of RM26 million to the 1st plaintiffs and the 1st defendant will also participate in the syndicated loan. This means the end-finance facility will be syndicated and the 1st defendant will act as the

manager. It is also a term of the agreement that the 1st defendant would be paid a management fee of 0.5% of total loan amount syndicated. In my opinion, as the end-financing loan involves syndication, the approval of the said facility must be subject to the compliance of such terms as getting the participation of the financial institutions and the execution of a participation agreement between the lead bank ie, the manager for the syndication and each participating financial institution.

It must be appreciated that syndication of loan has been a feature of domestic financing in Malaysia for some time. Syndication is a term used to refer to a loan whereby several lenders ie, banks and financial institutions combine in their efforts to extend a loan to a borrower. Usually, the sums involved are too large a sum for a single bank to grant the loan. So, the lead bank makes the necessary approaches to other banks for participation in the syndication.

Gabriel's *Legal Aspect of Syndicated Loan,* Butterworth 1986 p. 115 explains in simple language what is syndication:

> By syndication is meant two basic activities; one where there is a group of banks lending directly to the borrower, and the other where one bank lends directly or agrees to lend to the borrower and then subsequently sells all or part of its interest in the loan to other lenders. In both situations there is typically one main bank, referred to as the lead bank or lead manager, or simply as the lead, which enters into initial discussions with the borrower. Typically, upon successful discussions the borrower would grant the lead bank the 'mandate' or authority to syndicate the credit. The lead in turn commits to the borrower to syndicate the credit. Such commitment is usually made on a 'best effort' or 'in principle' or 'fully underwritten' basis. The offer to the borrower may further be made 'subject to acceptable documentation'.
>
> Armed with this mandate the lead bank then makes the necessary approaches to various banks to include them as principals to the envisaged loan agreement or as indirect participants depending on the kind of syndication contemplated by the borrower and the lead bank.

Taking cognisance of the above principle of loan syndication and on the true construction of **Part II For End-Finance** in the agreement, in my opinion, in the circumstances of this case, the approval of end-finance of RM26 million to the 1st plaintiffs must be subject to, principally, the participation of the other financial institutions in the syndication of the said end-finance. Since, as will be shown shortly, the said syndication did not materialise and no participation agreement was executed between the 1st defendant, as syndicate leader, and the other lenders, it is wrong for the court to hold the 1st defendant liable to the 1st plaintiffs under the agreement.

I am also of the view that the finding of the learned judge at p. 79 that the conduct of the 1st defendant in preparing the placement memorandum and using it to invite potential financial institutions to participate in the syndication of the end-finance facility amounted to giving an unqualified commitment to the 1st plaintiffs to make available the end-finance loan subject to the terms and conditions of the agreement is misconceived. Clearly, the learned judge failed to appreciate the legal concept of loan syndication, especially the purpose of placement memorandum. It is trite that in loan syndication, the preparation of placement memorandum is a condition precedent to a commitment to lend by the participating financial institutions. A passage from an article: *Loan Syndication, The Placing Memorandum and its implications for the Managing or Lead Bank* by Mr. Anthony Lim Wee Teck in [1982] 2 MLJ lix is instructive. The learned writer stated:

> In structuring and selling the loan, the lead bank with the assistance of the borrower often prepares a placing or information memorandum summarizing the financial condition of the borrower, the soundness of the collateral offered and the structure, terms and conditions of the proposed loan, so that the prospective participants to whom it is distributed can evaluate and form a decision as to the proposal. This memorandum frequently contains claims and projections that are wholly unsubstantiated. The lead bank, in an effort to limit its liability for these representations, typically includes a disclaimer limiting its responsibility for verifying that all facts presented are true and that all material facts have been disclosed. The lead bank also encourages each participant to conduct an independent credit analysis of the borrower.

In the present case, DW1 testified that the 1st defendant prepared the placement memorandum after consulting the 1st plaintiffs, who earlier agreed that the 1st defendant would act as manager in the syndication of the end-finance of RM26 million. They then sent out the placement memorandum to eight financial institutions operating in Kluang. Apparently, the 1st defendant, Public Finance Bhd. and Malaysia Credit Finance Bhd. were interested to participate in the syndication. Both the 1st defendant and Public Finance Bhd. had initially offered to provide RM5.0 million and RM3.0 million respectively toward the syndication. However, due to some disagreement regarding the security for the loan, Public Finance Bhd. withdrew its offer. Hence, the entire syndication for the end-finance of RM26 million never materialised.

It is not disputed that under the agreement, the 1st defendant would provide RM5.0 million toward the end-finance facility. It seemed that the said facility was readily available and the 1st plaintiffs' directors executed a guarantee agreement on 16 November 1984. However, the release of the aforesaid amount would be subject to the conditions provided for under the said agreement. First, the payment of a management fee of 0.5% to the 1st defendant upon the execution of the master agreement. Secondly, money

payable as end-financing money would only be drawndown in proportion to work in progress to be certified by the project's architect. In short, the project architect's certificates are a prerequisite for the release of the end-finance. From the evidence of PW1 and DW1, I am satisfied the management fee of 0.5% of the amount syndicated was never paid by the 1st plaintiffs. Nor was the master agreement signed. PW1 also testified that there was no project architect's certificates available. In the result, no housing loan was given out to the 1st plaintiffs' purchasers because the syndication of the sum of RM26 million for end-financing did not go through, not only because of lack of participation by financial institutions, but also non-fulfilment of the conditions under the agreement by the 1st plaintiffs. In the circumstances, no liability could be attributed to the 1st defendant or their servant or agent in failing to secure the end-finance facility of RM26 million.

For the above reasons, I am of opinion and respectfully hold that the learned judge was wrong on her conclusion that the plaintiffs have proved their claim of negligent misrepresentation against the 1st defendant because Pang had represented to the 1st plaintiffs the availability of end-finance was a certainty and the first drawdown would be made in the first quarter of 1984.

Collateral Warranty

With respect to the alternative cause of action for a breach of collateral warranty, the trial judge held that Pang's oral representation constituted a collateral warranty and therefore the plaintiffs had successfully made out their case against the 1st defendant for a breach of the warranty.

Counsel submitted that the learned judge was wrong in fact and law to rely on PW1's evidence regarding Pang's assurance as constituting a representation. According to counsel, PW1 merely formed an impression after hearing what Pang allegedly told him about the availability of the end-finance. The learned judge had "elevated" the word "impression" to a "representation".

This is how the learned judge approached the issue (pp. 93-95):

> To establish the presence of a collateral contract, the plaintiffs must show
>
> (1) that there must be a representation which was intended by the defendants to be relied upon.
>
> (2) the representation induced the signing of the contract.
>
> (3) the representation itself must amount to a warranty, collateral to the main contract and existing side by side with it.
>
> I have already made a finding that Pang did utter the statements which resulted in AB17-22 being issued and accepted, the charge, AB31-47, executed in favour

> of the 1st defendant and the guarantee, AB23-30, executed by the 2nd plaintiff being the other security given for the bridging loan ...
>
> As I have indicated above, Pang was the 1st defendant's Chief Manager, Southern Region, and in that capacity had the authority to approve loan facilities on behalf of the 1st defendant. There is also the evidence of DW1, DW2 and DW4 that where a developer buys land for the purpose of developing it, the availability of end finance is an important consideration for him and usually the developer takes the end finance to repay the bridging loan. This aptly describes the situation the 1st plaintiff found themselves when PW1 approached Pang for a bridging loan and end finance and on being made aware of the 1st plaintiff's purpose and intentions, Pang must be presumed to have intended that whatever representations he made on the availability of end finance would be relied upon by the 1st plaintiff.

At p. 98, she concluded:

> For the reasons that I have given, the plaintiffs have also successfully made out a case on the alternative plea that the defendants' oral representations constituted a collateral warranty and that there had been a breach of it when no part of the end-finance came from the 1st defendant.

Clearly, from the above grounds of decision, the finding of the learned judge was based on the representation allegedly made by Pang to PW1. In this regard, her Ladyship relied entirely on PW1's testimony. For the purpose of determining whether Pang's alleged statements amount to a warranty enforceable at the suit of the plaintiffs, I am guided by the test laid down by Lord Denning, M.R. in *Dick Bentley Productions Ltd. & Anor. v. Harold Smith (Motors) Ltd.* [1965] 2 All ER 65, 67 a test which had been followed and applied in subsequent cases. (See *Tan Chong & Sons, Motors v. Alan McKnight* [1983] 1 MLJ 220 at p. 227). The test is:

> Looking at the cases once more, as we have done so often, it seems to me that if a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act on it, and it actually induces him to act on it by entering into the contract, that is *prima facie* ground for inferring that the representation was intended as a warranty. It is not necessary to speak of it as being collateral. Suffice it that the representation was intended to be acted on and was in fact acted on.

Applying the above test, the key issue here is whether PW1's evidence regarding what he gathered from Pang's alleged statement during the negotiations for bank loans to the 1st plaintiff amounts to representation. The critical passage of PW1's evidence is found at pp. 125-6:

> We discussed in details the financial package that the 1st plaintiff requested

for the development of Taman Mewah. The 1st plaintiff required the bridging loan and an end-financing for the interested house buyers. The Managers of Hong Leong Finance required information of the 1st plaintiff and these information includes the paid up capital of the company and all relevant information about the company.

In the course of the discussions, Hong Leong was furnished with cash flow projections and drawdown through my Secretary on or about 15.8.83.

The bridging loan was to be done by the Hong Leong alone and Mr. Pang proposed to syndicate the end-financing. By syndication several banks would get together and provide the money and Hong Leong Finance would take the lead of this syndication. The amount of the bridging loan was discussed for $4½ million and $21 million for the end-financing for the house buyers.

In the course of the discussions in 1983, my impression was that Hong Leong was a big financial institution and they gave me the impression that their financing would pose no problem. There was no indication that they would fail. Mr. Pang told me that the total amount including bridging loan and end-financing was peanuts as far as Hong Leong was concerned. I accepted this as Hong Leong is a big company both in Singapore and Malaysia. It is a multilateral and multinational company.

This assurance as to the availability as to syndication was not qualified in any way. [Emphasis added].

PW1 continued (at p. 129):

The drawdown is of utmost importance to the 1st plaintiff. Neither Mr. Pang nor Mr. Chuang gave me any indication that there would be a problem to the 1st drawdown on the first quarter of 1984. The 1st defendant did not give me the impression that they would not be in a position to give the end financing. They were very serious.

In addition to the above passages, I have examined the rest of PW1's evidence closely with particular regard to the surrounding circumstances upon which Pang was alleged to have made the statements concerning the end-finance which led the learned judge to make the following finding (p. 81):

This is clear from the evidence of PW1 when he testified that he was assured by Pang that an entity of the 1st defendant's financial standing would have no difficulty in procuring the syndication of the end-finance and that the sum of RM21 million, the amount that was then under consideration as the end-finance, was "peanuts" as far as the 1st defendant were concerned and that the first drawdown of the end-finance was available during the first quarter of 1984.

In my view, the learned judge misdirected herself in the appreciation of PW1's evidence. Nowhere in the evidence was it said that Pang had represented to him about the 1st defendant securing the end-finance for the 1st plaintiff and

the first drawdown would be on the first quarter of 1984. What PW1 said was to the effect that in the course of his discussions with Pang in 1983 regarding banking facility for the 1st plaintiff's project, he formed an impression that the 1st defendant would not have any problem in securing the end-finance. It would appear that this impression is based on the following factors. First, he knew that the 1st defendant was a big financial institution and as such their financing would pose no problem. Secondly, he said Pang told him that the amount of the entire loan was peanuts as far as the 1st defendant were concerned. He believed what Pang told him because he knew that the 1st defendant was a big multilateral and multinational company operating both in Malaysia and Singapore. On the drawdown of the loan, he said Pang did not give any indication that there would be a problem for its first drawdown to be made on the first quarter of 1984. Hence, he concluded:

> The 1st defendant did not give me the impression that they would not be in a position to give the end-financing. They were very serious.

Based on the above evidence, I am in no doubt at all that Pang never represented to PW1 about the certainty of the 1st defendant securing the end-finance for the 1st plaintiff. In my view, the impression formed by PW1 does not amount to a representation, nor can it be implied that a warranty had been given by Pang on behalf of the 1st defendant.

In the circumstances, I hold that Pang never made any oral representation to PW1.

In law, in order to establish a collateral warranty, the plaintiff has to establish, *inter alia,* that the relevant statement is promissory and not merely representational. This test was enunciated by the highest court of Australia, ie, the High Court in *J.J. Savage & Sons Pty. Ltd. v. Blakney* [1970] 119 CLR 435 at p. 442 and later followed by the same court in *Ross v. Allis-Chalmers Australia Pty. Ltd.* [1981] 55 ALJR 8. The brief facts of the case were these. The plaintiff claimed that he purchased a harvester on the face of the promise made to him concerning its performance by Mr. Preston, a servant of the defendant. He claimed further that the promise or warranty was not fulfilled and that as a result he suffered loss for which he sought damages. The context in which the actual statement was made was that the plaintiff said that Preston (the area manager) had said to him that "as a contractor he was able to get with his machine (the C2) in the vicinity of 100 acres a day in very good going, and that (the plaintiff) could expect to be able to operate these gleaners in top gear in very good going". The plaintiff had then made certain calculations and he had put to Preston the assumption that he would get 120

to 130 acres a day and that Preston had then said that he (the plaintiff) "... may have been a little bit optimistic on my (the plaintiff's) 110 to 120 acres". The plaintiff then said to Preston "Well bring it back for budgeting purposes to 100. Is that feasible?" and that Preston had then said "my own experience with our machine is you should budget on 90 acres per day". It is this last statement which is claimed to be a collateral warranty. In his action in the Supreme Court of N.S.W., the plaintiff failed to persuade the trial judge that the above statement amounted to a warranty. He appealed to the Court of Appeal where he also failed. On further appeal to the High Court of Australia, in dismissing the appeal, it held that in the context in which the statement was made, the words used by Preston did not constitute a warranty and amounted no more than a statement of Preston's opinion, based on his own experience with his own machine. By reason of its character, it contained no promissory element.

In his judgment, Aickin J stated (at p. 12):

> It seems to me that the critical conversation as deposed to stopped short at the point of representation and contained no promissory element. For that representation to be converted into a promise there would have been required at least some further question such as "Can you promise that?", and an affirmative answer.
>
> The distinction between a representation and a promise is clear enough in law but it is one which laymen would probably find hard to understand, since it depends in many cases on niceties of language in conversations recounted, often years afterwards, by persons who would not have been conscious of the significance of the particular words used at the time. In these circumstances the search for "promissory language" becomes a somewhat unreal one and the distinction between an inducement and a promise a very fine one. However these are the criteria upon which this particular point depends and they propound a test ...

Assuming for the moment that this court accept PW1's evidence on Pang's statement regarding the availability of the end-finance, in my view, such statement or representation cannot be promissory in nature. For the representation to be converted into a promise, there ought to be clearer evidence from PW1 what Pang actually said during the course of their discussion. What is in evidence is only PW1's impression. Further, in the course of their discussions regarding the entire bank loan, PW1 must have known or presumed to know that in banking practice, end-finance facility requires the approval of all participating financial institutions. At that point of time, it was inconceivable for PW1 or Pang to know which banks or financial institutions would participate in the syndication. Moreover, PW1 must know that syndication depended upon compliance with the conditions in Part

(II) of the agreement. In my view, in such circumstances, it is unlikely for Pang, being an experienced banker to give an assurance or promise that the 1st defendant would secure the end-financing facility at whatever cost. After analysing PW1's evidence on the issue, I am satisfied that his evidence regarding Pang's alleged representation contains no promissory element and therefore does not amount to a warranty.

Another legal point raised by Encik Abraham concerned the admissibility of Pang's oral representation under proviso (b) of s. 92 of the Evidence Act (the Act). I note from the appeal record that this point was never fully canvassed before the trial judge, although the Federal Court judgment in *Tan Swee Hoe Co. Ltd. v. Ali Hussain Bros.* [1980] 2 MLJ 16 was cited and briefly discussed in the written submission. In view of my conclusion that Pang's statement does not constitute a warranty, I think it unnecessary to deliberate and express an opinion without the benefit of hearing counsel on this important point of law. Perhaps, there may be an occasion in the near future for this point to be raised again and fully argued. Nonetheless, it is still an important point of law because of a conflict of judicial opinion regarding s. 92 of the Act and its exceptions. In *Tan Swee Hoe,* Raja Azlan Shah CJ (Malaya) (as His Majesty then was) seemed to rely on English precedents on parole evidence to support the proposition that an oral promise given at the time of contracting which induces a party to enter into the contract, overrides the main written agreement. His Majesty continued (at p. 18):

> This device of collateral contract does not offend the extrinsic evidence rule because the oral promise is not imported into the main agreement. Instead it constitutes a separate contract which exists side by side with the main agreement.

In *Tan Chong & Sons Motor Co. v. Alan McKnight,* the Federal Court had also to consider the admissibility of pre-contract statements under s. 92 of the Act. Unfortunately, *Tan Swee Hoe* was never referred to the court. But Salleh Abas FJ (as he then was) in dealing with the issue, observed (at p. 229):

> The primary purpose of proving the pre-contractual statements ... was not to contradict, vary, add or subtract the terms of the Order, but to prove the existence of a warranty, a separate contractual promise, although such proof resulted in a conflict between the warranty and the terms of the contract ... Such proof is obviously allowed by the provisos (b) and (c) and illustrations (d), (g) and (b) of section 92.

However, in *Tindok Besar Estate Sdn. Bhd. v. Tinjar Co.* [1979] 2 MLJ 229, the Federal Court took a different approach by applying the strict language

of the section. At p. 233, Chang Min Tat FJ observed:

> I think and I say so with respect, the fundamental mistake made by the learned judge is to conclude simply and without qualification that section 92 applies only to a case where all the terms of the agreement have been reduced to writing. But that is not what section 92 says. It merely says "where the terms ..." and by referring back to section 91, it means where the terms of a contract have been reduced to writing, as in this particular agreement they had been, the contract could only be proved by the document itself, and it is not open to the respondent to seek to introduce and the judge to admit evidence that would, *inter alia*, add new terms to it.
>
> However section 92 allows, so far as it concerns this particular case, evidence in proviso (b) of "any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms" and in proviso (c) of "any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract ..." The provisos qualify but do not eliminate the main provisions of the section, so that unless the additional evidence sought to be adduced falls within the scope of any of the provisos, it should not be allowed to be introduced as it would be to contradict, vary, add to or subtract from the terms of the agrement.

Having stated the above, it is my conclusion that her Ladyship had committed an error of law in her finding that Pang's statement amounted to a warranty and the evidence established a breach of it.

Conclusion

For the above reasons the plaintiffs' appeal should be dismissed and the defendants' cross-appeal be allowed with costs. Deposit for the appeal be paid to the defendants to account for taxed costs.